89-694

Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELECTRIC POWER BOARD OF CHATTANOOGA,
Petitioner,

v.

MONSANTO COMPANY, GENERAL ELECTRIC COMPANY, McGRAW-EDISON COMPANY, CENTRAL MOLONEY, INC., WAGNER ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, SANGAMO ELECTRIC CORPORATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Question Presented for Review

Whether 42 U.S.C. § 9658 requires that state statutes of limitation applicable to tort claims for property damage predicated on the release of a hazardous substance into the environment from electrical equipment begin to run no sooner than the date of the release?

Parties to the Proceedings Below

The parties to the proceedings in the Court whose judgment is sought to be reviewed are:

Plaintiff-Appellants are:

Electric Power Board of Chattanooga
Huntsville Electric Utilities Board

Defendants-Appellees are:

Monsanto Company
General Electric Company
McGraw-Edison Company
Central Moloney, Inc.
Wagner Electric Corporation
Westinghouse Electric Corporation
Sangamo Electric Corporation

Pursuant to Supreme Court Rule 28.1, Petitioner certifies that, it is an independent Board of the City of Chattanooga, State of Tennessee, a municipal corporation. It has no subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ___

ELECTRIC POWER BOARD OF CHATTANOOGA,
Petitioner,

v.

MONSANTO COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Electric Power Board of Chattanooga, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered July 14, 1989.

Opinions Below

The opinion of the District Court for the Eastern District of Tennessee, dated February 29, 1988, is unreported. The case number in the District Court is CIV No. 1-85-634. The opinion of the Court of Appeals for the Sixth Circuit styled *Electric Power Board of Chattanooga, et al. v. Monsanto, et al.*, is reported at 879 F.2d 1368.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was decided and filed on July 14, 1989. A petition for rehearing on behalf of the Plaintiffs-Appellants was filed by leave of the Court of Appeals on July 27, 1989, as noted in the order on the Petition. The Petition was denied by order of the Court entered August 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes, Federal Rules, and Regulations Involved

42 U.S.C. § 9658 provides as follows:

(a)(1) Exception to state statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages,

which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607

Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this chapter.

(b) Definitions

As used in this section

(1) Subchapter I terms

The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement

date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules

In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

Statement of the Case

This is an action brought under state law by the Electric Power Board of Chattanooga ("Chattanooga"), a Board of the City of Chattanooga, Tennessee, and by the Huntsville Electric Utilities Board, a Board of the City of Huntsville, Alabama, also a municipal corporation,[1] to recover damages for inju-

[1] Each plaintiff is a public body created to provide electric service to the citizens of their cities and the surrounding areas. Each exists solely for the benefit of its citizens, operating on a nonprofit basis and with any excess revenue being used only for electric system purposes with no funds to be used for the general benefit of its City government except for an amount for a fair share of in-lieu tax equivalent payments.

ries resulting from the presence of polychlorinated biphenyls (PCBs) in, and the release of PCBs from, certain electrical equipment.[2] The various Equipment Defendants[3] manufactured the electrical equipment in question. The remaining defendant, Monsanto Company, produced the PCBs ultimately incorporated in the electrical equipment at issue. PCBs are chemical compounds which, because they are stable and fire resistant, were used in the past as a cooling or insulating fluid in electrical equipment. They have been regulated as a toxic substance since the passage of the Toxic Substances Control Act in 1976, 15 U.S.C. § 2601 *et seq.*, in which Congress specifically found PCBs to be hazardous. The federal government acting through the Environmental Protection Agency determined some seven years later that PCBs in electrical equipment, such as that at issue in this case, pose a hazard to human health and the environment. (*See, e.g.*, 47 F.R. 37342 (August 25, 1982); 50 F.R. 29170 (July 17, 1985).[4] The continued use and disposal of

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[2] *E.g.* electrical transformers, capacitors, voltage regulators and other electrical equipment located on the electric distribution systems of the Plaintiff Chattanooga and Huntsville Electric Utilities Board.

[3] General Electric Company, Central Moloney, Inc., Wagner Electric Corporation, Westinghouse Electric Corporation, Sangamo Electric Corporation and McGraw-Edison Company.

[4] EPA initially determined in a final rule published May 31, 1979 that continued use of "intact, nonleaking capacitors, electromagnets, and transformers" "would not present an unreasonable risk of injury to health or the environment." 44 F.R. 31514. This rule was declared invalid as predicated on insufficient information. *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1284-1286 (D.C. Cir. 1980). An amended rule recognizing the hazards posed by PCBs in electrical equipment,

PCBs are subject to detailed, and burdensome, regulatory restrictions. *See, e.g.* 50 F.R. 29170, 47 F.R. 37342. *See, generally*, 15 U.S.C. § 2601, *et seq.*

The action below involved two principal classes of electric equipment, and several theories of recovery. The first class of equipment at issue includes equipment which contains PCBs by design. In this equipment the fluid containing PCBs typically has a concentration of 60 to 70 percent (600,000 to 700,000 parts per million) of PCBs. In addition, Plaintiffs purchased from the Equipment Defendants various pieces of equipment which were not designed or intended to contain PCBs, but which, under the allegations of the Complaint, were supplied by the Defendants to the Plaintiffs contaminated with PCBs in varying concentrations. As a result of the presence of PCBs in this equipment, its use and disposal is regulated by the EPA and various state agencies under numerous statutes, and has been found by regulatory agencies to pose certain distinct hazards to human health and the environment. With respect to each class of equipment, Plaintiffs sought recovery for the loss that it had suffered as a result of the hazards posed and injuries caused by the PCBs in its electrical equipment under both tort and warranty theories.

The various Defendants, generally, asserted that Plaintiffs' claims were barred by the Tennessee Statute of Repose, T.C.A. § 29-28-103, and other applicable state statutes of limitations. Plaintiffs resisted this argument on several theories, presenting evidence that the Defendants had concealed the hazards

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and restricting their use, was published on August 25, 1982. 47 F.R. 37342.

posed by PCBs, and noting that, while PCBs generally had been the subject of regulatory action since the passage of the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.*, the EPA had not determined that PCBs in electrical equipment were hazardous in certain applications until, at the earliest, August 25, 1982, within three years of the date of filing of the Complaint. *See* 47 F.R. 37342. In addition, Chattanooga argued that, with respect to those claims which sought recovery for property damage caused by the release of PCBs from Chattanooga's electrical equipment, 42 U.S.C. § 9658 modified the application of the various state statutes of limitations, and prevented their bar of Chattanooga's claims.[5]

The District Court rejected the Plaintiffs' arguments. In rejecting the Plaintiffs' assertions that 42 U.S.C. § 9658 should modify the commencement date of the state statutes of limitation as to damages caused by leaks of PCBs, the District Court held that the various releases of PCBs that had been shown in the evidence were not leaks into the environment within the meaning of 42 U.S.C. § 9658. Ultimately, by Order dated February 29, 1988, the District Court

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[5] 42 U.S.C. § 9658, added by amendment to the Comprehensive Environmental Response, Compensatory and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq.*, in 1986, provides, in pertinent part, that applicable statutory limitations periods for actions brought under state law for personal injury or property damage caused or contributed to by releases of specified hazardous substances would commence no earlier than the date the Plaintiff knew or reasonably should have known that the personal injury or property damage for which recovery was sought caused or contributed to by the release of the hazardous substance concerned.

held that the Plaintiffs' claims before the Court were barred by the applicable state statutes of limitations.

On appeal, the Court of Appeals affirmed. The Court of Appeals found that the Plaintiffs had actual knowledge of the hazards posed by the presence of PCBs in electrical equipment more than four years before the date that the action was commenced. On that basis, the Court of Appeals declined to reach the issues raised with respect to the application of 42 U.S.C. § 9658 to the several state statutes of limitations. The Court of Appeals held that the "federally required commencement date" under 42 U.S.C. § 9658 is

> virtually identical to the notion of accrual date under Tennessee law.... CERCLA would require a party to commence his or her claim when the party knew or should of known of the cause of action, 42 U.S.C. § 9658(b)(4), as would Tennessee law. [Citation omitted]. As discussed above, this date was at least four years before the suit was filed. Thus, because the instant suit was not commenced until at least four years later, CERCLA statute of limitations would bar the instant action, just as the Tennessee statutes do. Since accrual in Tennessee occurs at the same time as under CERCLA—when the plaintiff knew or should have known of the availability of the claim—application of CERCLA would not change the result of this case. We find that further analysis of the applicability of CERCLA is unwarranted.

Electric Power Board of Chattanooga, et al. v. Monsanto Co., et al., 879 F.2d 1368, 1378 (6th Cir. 1989)

The Court of Appeals' analysis did not take into account that certain of Chattanooga's claims arose from property damage caused by releases of PCBs into the environment within three years of the date of the Complaint[6], and this Petition addresses only that particular subset of Chattanooga's claims. The undisputed proof showed that numerous transformers manufactured by each of the Equipment Defendants leaked PCBs into transformer vaults of Chattanooga typically located under sidewalk grates and open to the air and rain. These leaks contaminated and damaged Chattanooga property other than the transformers themselves on a number of occasions after November, 1982, all within three years of the date of the commencement of this action. Undisputed evidence showed that the cost of repairing property damage to the transformer vaults in which the leaking PCB transformers were located exceeded $10,000 per vault, and that the total cost of removal and replacement of the transformers which were causing the leaks exceeded $3 million. Accordingly, 42 U.S.C. § 9658 prevented the commencement of the running of applicable state statutes of limitations for those claims for property damage resulting from equipment leaks until, at the earliest, the dates of the leaks. As the shortest applicable statute is three years, there could be no bar of any of Chattanooga's claims for damages arising from leaks that occurred within three years of the date of the complaint. The Plaintiffs' Petition for Rehearing pointing out this issue was denied on August 17, 1989. This Petition followed.

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[6] The Tennessee state statute of limitations applicable to claims for property damage is three years. T.C.A. § 28-3-105.

Existence of Jurisdiction Below

The District Court for the Eastern District of Tennessee had jurisdiction over the state tort claims by removal under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1332(a)(1). The Complaint was filed on August 23, 1985, in Tennessee state court, and removed to federal court on September 27, 1985.

Reasons for Granting the Writ

The decision below should be reviewed because it erroneously interprets the application of 42 U.S.C. § 9658 so as to defeat the clear Congressional intent that state causes of action seeking recovery for injuries resulting from the release of hazardous substances into the environment are not to be barred by state statutes of limitations which begin running prior to the "federally required commencement date" as defined in 42 U.S.C. § 9658(b)(4).

The statute at issue, 42 U.S.C. § 9658, embodies a clear choice by Congress as to the proper allocation of responsibility for the immense task of eliminating contamination of the environment by hazardous substances, now confronting all sectors of society. Congress chose to allow much of that allocation of responsibility to be made by traditional state law principles, with the signal exception that states would not be permitted to bar recovery through the application of limitation of action rules before injured parties had knowledge of the injury and its relationship to the release of a hazardous substance into the environment. Perforce, states would not be permitted to bar the action before the injury occurred. By applying a state statute of limitation to bar Chattanooga's claims for property damage arising from releases occurring

within three years of the date of the Complaint, the Court of Appeals has done violence to that intent.

The issue presented here is simply whether 42 U.S.C. § 9658 permits the running of a state statute of limitation applicable to a tort claim for harm caused by the release of a hazardous substance into the environment to begin prior to the date of the release. Such was the holding of the Court of Appeals, which stands at present as the sole decision by a federal court of appeals on this point. This holding eviscerates the statute and merits correction by this Court.

As noted previously, EPB presented evidence that numerous transformers manufactured by each of the Equipment Defendants leaked PCBs into transformer vaults of EPB,[7] contaminating and damaging EPB property other than the transformers themselves, within three years of the date of the commencement of the action. In 42 U.S.C. § 9658, Congress provided that applicable statutory limitation periods for actions brought under state law for personal injury or property damage caused or contributed to by the release of certain hazardous substances, including PCBs, would commence no earlier than the date that the plaintiff knew or reasonably should have known that the personal injury or property damage for which recovery was sought was caused or contributed to by release into the environment of the hazardous sub-

[7] As in the case of most utilities with facilities in urban areas, EPB maintains transformer vaults to serve its downtown underground electric distribution network. Most of these vaults are located beneath pedestrian walkways and sidewalks and are open to the air and weather through metal grates and drains.

stance concerned.[8] In essence, 42 U.S.C. § 9658 establishes a discovery rule for statutes of limitations in all toxic tort actions, preempting any inconsistent state statute. In this case, in which recovery is sought for the damage caused by specified leaks from the

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[8] As a result of its approach, the Court of Appeals did not reach the question of the application of 42 U.S.C. § 9658 in the present action. Each of the requisite elements for that application is satisfied in this case: The action must be brought under state law for personal injury or property damage

1. caused or contributed to by exposure to a hazardous substance;
2. released into the environment;
3. from a facility.

First, PCBs are a hazardous substance. Hazardous substance is a term defined by CERCLA, at 42 U.S.C. § 9601(14), a definition expressly incorporated by 42 U.S.C. § 9658(b)(1). Under that definition, a hazardous substance includes various materials designated pursuant to other federal statutes. PCBs have been so designated. *See* 40 C.F.R. § 116.4; 40 C.F.R. § 129.4(f); 40 C.F.R. § 401.14(54); 40 C.F.R. § 761.1 *et seq. C.f. United States v. Ward*, 618 F.Supp. 884, 894 (E.D. N.C. 1985). Secondly, any release that took place was from a facility, as that term is defined in CERCLA. 42 U.S.C. § 9601(9). Under CERCLA, a facility is broadly defined and

> includes any place where hazardous substances come to be located. Thus, to show that an area is a "facility", the plaintiff need only show that the hazardous substance has been placed there or has "otherwise come to be located" there.

United States v. Bliss, 667 F.Supp. 1298, 1305 (E.D. Mo. 1987). Finally, the hazardous substance must have been "released into the environment". "Release" includes spilling, leaking, pumping, and pouring, and is clearly broad enough to cover the discharge of PCBs from Chattanooga's equipment. 42 U.S.C. § 9601(22).

transformers at issue, the federally required commencement date under 42 U.S.C. § 9658 applicable to all relevant statutes of limitations, including the Tennessee Statute of Repose, can be no earlier than the date at which the release causing the property damage at issue occurred.

Contrary to the reasoning of the Court of Appeals, the federally required commencement date is not identical to the more restrictive Tennessee "Discovery Rule", as the federally required commencement date is triggered by knowledge not simply of some injury, but knowledge of the causal connection between that injury and the release of a hazardous substance.[9] By virtue of 42 U.S.C. § 9658, the statutory limitation period for a cause of action for property damage commenced each time a PCB transformer was discovered by Chattanooga to have leaked and caused damage to the property of Chattanooga. By holding that the "federally required commencement date" under 42 U.S.C. § 9658 could occur before the date of a release of a hazardous substance, the Court of Appeals rendered the protections that Congress intended to afford by the statute ineffective. The essence of the "federally required commencement date" is knowledge of the injury and its causal connection to the release of a hazardous substance. That knowledge cannot exist prior to the release itself. To hold as did the Court of Appeals that knowledge of the hazard is the same as knowledge of the release and the re-

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[9] *See* Injuries and Damages From Hazardous Waste . . . a report to Congress in compliance with § 301(e) of CERCLA, printed for the use of the Senate Committee on Environment and Public Works, Serial Number 97-12 (September, 1982), Part 1, at Pages 28-30, 240-241.

sulting injury rewrites the statute and perverts the intent of Congress. Most persons living or working in proximity to toxic substances are aware of the general hazard posed. The point of Congress in passing 42 U.S.C. § 9658 was to tie that knowledge to a release and resulting injury and to permit maintenance thereafter of an action under state law.

The opinion of the Court of Appeals in this action is the only decision of which we are aware that turned squarely on the meaning of the "federally required commencement date" under 42 U.S.C. § 9658. However, prefatory language in one of two other Court of Appeals decisions construing 42 U.S.C. § 9658 on different points is conflicting. In *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434 (7th Cir. 1988), a case seeking recovery for a former employee's exposure to asbestos in his workplace, the Court of Appeals, after noting the definition of "federally required commencement date", stated that

> federal law replaces the date of delivery of the asbestos [the commencement date of the limitations period under state law] with the date on which the disease became manifest.

Covalt v. Carey Canada, Inc., supra, 860 F.2d at 1436. (The case was ultimately decided on the meaning of "release into the environment".) The other Court of Appeals decision to construe 42 U.S.C. § 9658, *First United Methodist Church of Hyattsville v. United States Gypsum Co.*, No. 88-1612, slip op. August 10, 1989 (4th Cir.), did not discuss the "federally required commencement date" language, apparently assuming the common meaning of the definition. (The case turned on the application of 42 U.S.C. § 9658 to asbestos removal actions.) *See also, Knox v. AC&S, Inc.*, 690 F.Supp. 752, 755 (S.D. Ind. 1988). (This case also

involved injuries resulting from asbestos, and also was decided on the meaning of "release . . . ").[10]

Chattanooga respectfully suggests that its claims in this action arising from releases of PCBs occurring within three years of the date of the complaint are not barred by the various state statutes of limitations cited by the Court of Appeals. Rather, under the provisions of 42 U.S.C. § 9658, the statute of limitations with respect to each of those claims began to run on the date on which Chattanooga discovered the leak and its damage, and certainly no sooner than the date on which the releases occurred. Accordingly, with respect to those claims for damage arising from the release into the environment of PCBs from electrical equipment occurring within three years of the date of the complaint, Chattanooga believes that the opinion of the Court of Appeals is in error and should be reversed, and the cause remanded to the Court of Appeals for consideration of the issues relating to those claims pretermitted by its decision. Failure to do so will leave intact as the sole appellate interpretation of "federally required commencement date" under 42 U.S.C. § 9658 a reading of the statute that defeats its clear purpose.

Conclusion

For the reasons set forth above, it is respectfully requested that this petition for a writ of certiorari

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[10] As noted in *First United Methodist Church, supra*, these cases may be more logically analyzed on the basis that asbestos actions are exceptions from the scope of CERCLA, rather than by attempting to make a limiting construction to the language of 42 U.S.C. § 9658 in contradiction to the general intent of CERCLA.

be granted for the purpose of reviewing and correcting the departure by the Court of Appeals from the clear intent of Congress in enacting 42 U.S.C. § 9658, and settling the correct interpretation of this statute.

Respectfully submitted this
12th day of October, 1989.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88-5372

ELECTRIC POWER BOARD OF CHATTANOOGA, a Board of the City of Chattanooga, a Municipal Corporation; HUNTSVILLE ELECTRIC UTILITIES BOARD, a Board of the City of Huntsville, Alabama, a Municipal Corporation,

Plaintiffs-Appellants,

v.

MONSANTO CO.; GENERAL ELECTRIC CO.; CENTRAL MOLONEY, INC.; WAGNER ELECTRIC CORP.; WESTINGHOUSE ELECTRIC CORP.; SANGAMO ELECTRIC CORP.; MCGRAW-EDISON CO.; ALLIS-CHALMERS CORP.,

Defendants-Appellees.

On Appeal for the United States District Court for the Eastern District of Tennessee

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Decided and Filed July 14, 1989

Before: ENGEL, Chief Judge; BOGGS, Circuit Judge; and COHN, District Judge.*

BOGGS, Circuit Judge. This is an appeal by the Electric Power Board of Chattanooga (EPBC) and Huntsville Elec-

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* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

tric Utilities Board (HEUB) from dismissal of their claims against defendants, Monsanto Co. (Monsanto), and General Electric Co., Central Moloney, Inc., Wagner Electric Corp., Westinghouse Electric Corp., Sangamo Electric Corp., and McGraw-Edison Co. (equipment defendants). Allis-Chalmers Corp. was also named as a defendant, but Allis-Chalmers has filed for bankruptcy and all actions against it have been severed and stayed. The district court dismissed all claims, finding that they were barred by either the statute of repose or the tort and contract statutes of limitations, and that federal environmental statutory provisions did not save the claims from being time barred. We affirm on the grounds of the statutes of limitations.

I

This suit was brought to recover damages for injuries from the presence of polychlorinated biphenyls (PCBs) in certain of EPBC's and HEUB's electrical transformers (devices which convert variations of electrical current in one circuit into the variations and voltage of another), capacitors (devices which store and stabilize electrical output), voltage regulators (specialized transformers which allow for more precise regulation of electrical currents than ordinary transformers), and other electrical equipment manufactured by the equipment defendants. The equipment defendants are corporations that manufactured and sold the electrical equipment containing PCBs. Monsanto produced the PCBs ultimately incorporated into the electrical equipment manufactured by the equipment defendants. PCBs are chemical compounds which, for safety reasons, have long been used as a cooling fluid in electrical equipment, and which have been regulated by the Environmental Protection Agency (EPA) for more than ten years.

This action involves two principal classes of electrical equipment, each of which presents somewhat distinct issues. First, EPBC and HEUB seek recovery for damages

from injuries suffered in connection with equipment containing PCBs, produced by the equipment defendants, which was designed and intended to include PCBs. This equipment contains PCBs by design and uniformly contains more than 500 parts per million (ppm) of PCBs; this equipment will be termed "PCB equipment." In addition, EPBC and HEUB purchased other equipment, not designed to contain PCBs, but which does contain 50-499 ppm of PCBs as a result of contamination during the course of the manufacturing process. This equipment will be termed "contaminated equipment." With respect to each class of equipment, EPBC and HEUB sought to recover under theories of restitution, nuisance, negligence, fraud and misrepresentation, strict liability, implied warranty, and express warranty. The two utilities seek to force the defendants to replace some 35,000 pieces of equipment. The majority of the equipment was purchased more than 10 years before this suit was filed; some equipment is as much as fifty years old. All of the equipment was purchased more than four years prior to the commencement of this action.

At the outset of the litigation, defendants asserted that most of the causes of action were barred by the Tennessee statute of repose and other statutes of limitations. Tenn. Code Ann. § 29-28-103, *et seq.* The trial court ordered that the statutes of limitations issue be briefed. However, after disagreements arose as to the proper scope of discovery under that Order, the trial judge directed that all discovery be stayed, and the parties were directed to brief the question of whether the statute of repose, as a matter of law, would preclude any cause of action, or part of any cause of action, stated by the plaintiffs in their complaint. After reviewing the briefs, the trial court ruled that the Tennessee statute of repose barred any part of the EPBC's claims arising under Tennessee law, relating to equipment manufactured by the defendants and purchased by the plaintiffs more than 10 years prior to the date the action

was filed. The Tennessee statute was not applied to HEUB because it is an out-of-state plaintiff. This decision was later amended to provide that the Tennessee statute of repose would not bar any of the plaintiffs' claims to the extent that those claims fell within an amendment to the Comprehensive Environmental Response Compensation Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.* That amendments, codified at 42 U.S.C. § 9658, in essence provided that any state statute of limitations for an action seeking compensation for property damages caused by exposure to a hazardous substance would not commence running until any consequent injury was discovered, regardless of pre-existing state law.

The court then proceeded to consider numerous motions for summary judgment submitted by the defendants. The court granted summary judgment to Sangamo on all claims brought against it by EPBC because they were barred by the statute of repose, and the CERCLA amendment did not apply because none of the claims arose from the release of PCBs into the environment. Subsequently, based on similar reasoning, the court dismissed all claims by EPBC against any other defendant for equipment purchased more than 10 years prior to the filing of the action. The court further held that Tennessee's statute of repose did not apply to HEUB, an Alabama entity. The court clarified and amplified this order on April 30, 1987, explaining that the case would proceed as a product liability action for breach of warranty with respect to equipment sold within four years of the date of the action, and as various tort actions regarding items that had caused damages to property within three years of filing the suit. The court added the proviso that, with respect to equipment owned by EPBC, the equipment in question must have been sold within 10 years of the date of commencement of the action. The court also held that the plaintiffs would not be permitted to show fraudulent concealment on the part of the defendants to toll any statute of limitations

because the hazards of PCBs have been a matter of public record since at least 1976.

Plaintiffs then were allowed to amend their complaint to allege that they were seeking damages for injuries to property caused by the release of PCBs, consistent with the language of CERCLA. The parties were ordered to brief the issue of the effect of this amendment, after which the court held that the amendment did not bring the case under CERCLA, 42 U.S.C. § 9601 *et seq.*, holding that no leaks into the environment causing property damage had occurred within the meaning of that statute.

In a series of orders dated February 29, 1988, the court first granted summary judgment on HEUB's claims against Central Moloney. No appeal has been taken from that decision. Second, the court severed the Allis-Chalmers claims and stayed that severed action. Then, the court entered an order severing those claims of the plaintiffs which had not been resolved by the prior order of the court, and dismissed those claims without prejudice. In addition, although apparently in contradiction, the court granted summary judgment and dismissed the remaining claims of both plaintiffs.

II

The underlying facts are as follows. EPBC and HEUB are public utilities of the cities of Chattanooga, Tennessee and Huntsville, Alabama, respectively. Each operates on a non-profit basis, purchasing electricity from the Tennessee Valley Authority (TVA) under contract with the TVA. As stated above, PCBs are chemical coolants used in electrical equipment for safety purposes. In the early 1970s, Congress's concern over the environmental effects of PCBs prompted hearings and the ultimate passage of the Toxic Substances Control Act, (TSCA), 15 U.S.C. §2601 *et seq.*, in 1976. TSCA required the EPA to establish rules governing the disposal and labeling of equipment containing

PCBs and to control their manufacture, processing and distribution, as well as their disposal. The statute prohibits the use of PCBs at all after January 1, 1978, unless the EPA authorized use in a "totally enclosed manner" upon a determination that use "will not present an unreasonable risk to injury of health or the environment." On May 31, 1979, the EPA published a final rule designating all "intact, non-leaking capacitors, electromagnets, and transformers, other than railroad transformers," as totally enclosed uses and permitting their continued use.

In *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1284-86 (D.C. Cir. 1980), the District of Columbia Circuit ruled that there was insufficient evidence in the administrative record to support EPA's classification of transformers, capacitors, and electromagnets as totally enclosed uses. The court invalidated that portion of the May 1979 rule and remanded it to the EPA for further action. *Ibid.* Those further hearings resulted in a final rule published on August 25, 1982, amending the May 1979 rule. This new rule prohibited the continued use after October 1, 1985, of electrical transformers and electromagnets containing more than 500 ppm of PCBs in or near facilities involved in the handling of food or feed items, and also prohibited the continued use of capacitors containing more than 500 ppm PCBs unless the capicitors were located in restricted access electrical substations or in contained and restricted access indoor areas. The August 1982 rule authorized the continued use for the remainder of their useful lives of all other categories of non-railroad electrical transformers, of capacitors located in restricted access substations and indoor installations, and of other electrical equipment containing less than 500 ppm PCBs. A number of the equipment defendants in this suit, as well as Monsanto, presented information to the EPA supporting the continued use of equipment containing PCBs.

On July 17, 1985, the EPA published another final rule placing further restrictions on the continued use of trans-

formers containing more than 500 ppm of PCBs in or near commercial buildings, prohibiting such use after October 1, 1990, and prohibiting further installations after October 1, 1985. This rule also requires the installation of enhanced electrical protection on certain other transformers containing more than 500 ppm PCBs by October 1, 1990. Again, a number of the equipment defendants, as well as Monsanto, participated in the rulemaking process by submitting evidence favoring the use of equipment containing PCBs.

The utilities claim that it was the passage of the July 1985 rule that caused them to become concerned over the safety of their continued use of equipment containing PCBs and ultimately led them to file this suit. EPBC believes that the replacement cost for the equipment containing PCBs exceeds ten million dollars; HEUB's estimated replacement cost is in excess of two million dollars.

On appeal, the utilities argue that the trial judge erred in ruling that they cannot show fraudulent concealment in an attempt to toll the statutes of limitations because they would be charged with notice of the hazards of PCBs as of 1976. They claim that the trial judge refused to recognize the distinction between the dangers of PCBs free in the environment and their dangers when contained in electrical equipment. They further claim that, as a result, little discovery on this issue took place, but nevertheless, there was adequate evidence to create an issue of fact. The plaintiffs claim that they did not understand that the use of PCBs in electrical equipment could pose a significant threat to human health and the environment until the promulgation of the July 1985 rule. Further, the utilities state that the defendants, individually and collectively, had the resources to discover the dangers of the use of PCBs in electrical equipment earlier, and that they had a duty to discover and inform the plaintiffs thereof because of their role as manufacturers and distributors. They further allege that the defendants, especially Monsanto, had

conducted tests and studies which showed the toxic effects of PCBs on the health of humans, and that Monsanto knowingly and falsely represented their safety to the plaintiffs as early as 1971. The plaintiffs charge that Monsanto misrepresented what it knew to be hazardous as safe, and even biodegradable. Allegedly, Monsanto "conspired" with a testing laboratory to present falsified studies to the EPA Comparable past conduct in connection with other chemicals resulted in the indictment and conviction of a Monsanto employee involved *United States v. Keplinger*, 776 F.2d 678 (7th Cir. 1985).

A number of the defendants are members of a trade association, the National Electrical Manufacturers Association (NEMA). In 1970, General Electric recommended to the NEMA Board of Directors that NEMA create a task force to study problems associated with the disposal of PCB-contaminated materials. The committee was composed of representatives of General Electric, McGraw-Edison, Sangamo, Westinghouse, and Central Moloney. In 1970, the committee recommended that NEMA join with Monsanto in establishing an industry committee under the auspices of the American National Standards Institute (ANSI) to study the use, maintenance, and disposal of PCBs in electrical equipment. One of the purposes of the committee was to avoid "any governmental restrictions [being] placed on the production of this material [PCBs]." As a result, the ANSI committee, designated C-107, was created and staffed by NEMA. The plaintiffs claim that the ANSI committee, as well as NEMA, helped to conceal the dangers of PCBs from regulatory authorities and users, and provided a means for the submission of false and misleading information to the EPA. For example, in a March 19, 1975 letter, Monsanto wrote to Westinghouse in response to questions regarding the toxicity of PCBs. Monsanto stated that although "no human harm has resulted" in "over 40 years of experience" with PCBs, "[t]here is a potential real effect to humans—including

death." However, NEMA, in its presentation to the EPA in connection with the August 1982 rule, stated that the continued use of electrical equipment containing PCBs posed no threat to human health or the environment.

The defendants argue, to the contrary, that the alleged dangers of PCBs in electrical equipment have been the subject of public hearings since 1971, as has the issue of whether leakage of PCBs from equipment requires replacement. The EPA repeatedly has refused to require removal and replacement of all equipment containing PCBs. Further, the utilities closely monitored the extensive congressional and agency proceedings concerning PCBs and do not dispute that they were fully aware of all of the resulting findings and determinations. Despite the claims of the utilities, the defendants assert and document the public nature of the hearings involved in the course of enacting TSCA, the enabling statute, as well as each EPA rule. For example, in August 1971, Congress commenced hearings on the need to regulate PCBs; these hearings culminated in the passage of TSCA. In March 1972, an interdepartmental Task Force of the United States Government issued a comprehensive report which recognized that the primary use of PCBs was in electrical equipment and specifically addressed the alleged dangers and risks associated with the use of PCBs in such equipment. Each EPA rule was preceded by at least one notice in the Federal Register, supporting documents, press releases and public statements, public meetings, reports and studies, all of which were available to the public through the EPA. In March 1980, based on reports submitted by utility industry representatives that PCBs tend to "weep" or "sweat" from electrical equipment, the EPA published a notice in the Federal Register specifically requesting information on the incidence and hazards of such leaks from all utility companies. There is no indication that either EPBC or HEUB responded to this request.

The defendants indicate, and the record confirms, that the utilities reviewed and monitored the public record and proceedings concerning PCBs on a regular basis, and have been aware of the dangers of PCBs since at least 1976. here is unrefuted evidence in the record demonstrating that the utilities participated in the federal regulatory proceedings concerning PCBs in electrical equipment. For example, in May 1982, EPBC filed comments, through the Utility Solid Waste Activities Group, with the EPA actively opposing any further restrictions on the use of PCBs. In those comments, EPBC acknowledge that PCBs "pose a serious threat to humans." Against during the period for public comment on the proposed July 1985 rule, the EPBC filed similar comments "strongly oppos[ing]" the proposed rule.

III

On appeal, the utilities, EPBC and HEUB, argue that they were not on notice of the hazards of PCBs until July 1985, and that they should be allowed to attempt to demonstrate the truth of their claim that the defendants, including Monsanto and the equipment defendants, misled them with respect to the effects of PCBs on the environment and human health. This proof, the plaintiffs claim, would show that the statutes of limitations were tolled until only a month before this suit was filed, in August 1985. Further, the utilities claim that they stated claims and should be awarded damages in tort, nuisance, restitution and all other theories raised in their complaint. They also claim that CERCLA substitutes a discovery rule for all state statutes of limitations in these circumstances. The defendant manufacturers and distributors claim that the district court was correct in determining that the statute of repose bars all claims regarding equipment purchased more than ten years from the date of filing of this suit, and that other statutes of limitations bar the remaining claims on behalf of the utilities. There has been no fraud-

ulent concealment, CERCLA does not apply, and tort and nuisance claims are barred by the statutes of repose and limitations.

A

The standard of review of a summary judgment is that summary judgment is appropriate when the moving party can show that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In deciding what law applies to a particular case, one must first look to the forum state's choice of law statute. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975). Generally, the procedural law of the forum state applies, including its statutes of limitations. *Whitfield v. City of Knoxville*, 756 F.2d 455, 461 (6th Cir. 1985). Thus, Tennessee law governs the statutes of limitations for all actions brought in this case.

B

As stated above, statutes of limitations are procedural rules and thus the statutes of limitations of the forum state—Tennessee—apply to the claims brought by both the Tennessee and the Alabama plaintiffs. In Tennessee, the appropriate statute of limitations is determined by the type of injuries claimed and the damages sought. The gravamen of most of the claims is injury to property. Actions for injuries to real or personal property must be commenced within three years of the date on which the action accrues. Tenn. Code Ann. § 28-3-105. This would apply to actions in negligence, strict liability, fraud, and misrepresentation as they affect the real property of the utilities.

The plaintiffs claim that the statutes of limitations for nuisance and restitution is found in Tenn. Code Ann. § 28-3-110. That statute provides that the period of limitations for actions "not expressly provided for" is ten (10) years. *Ibid.* However, we agree with the district court's conclusion that nuisance and restitution actions, in effect, are tort actions for injury to property, and so are subject to the three year statute of limitations. Tenn. Code Ann. § 28-3-105. *Black's Law Dictionary* 1180 (5th ed. 1979), defines "restitution" as the "[a]ct of restoring; restoration; . . . ; the act of making good or giving equivalent for any loss, damage or injury. . . . " In other words, restitution is a theory of recovery, not a substantive cause of action in itself. The question is whether one is attempting to restore rights granted and protected by a contract, or trying to vindicate property rights, which are protected by tort law. Here, it is clear that the restitution that is sought is the restoration of property rights protected by various torts actions. Thus, the three year statute of limitations for torts applies. Tenn. Code Ann. § 28-3-105.

As regards nuisance actions, *Black's Law Dictionary* 961 (5th ed. 1979), defines "nuisance" as "[t]hat which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him." Thus, nuisance law comes under the broad umbrella of "injury to property," which also is covered by Tenn. Code Ann. § 28-3-105, the three year statute of limitations.

Finally, breach of warranty actions are covered by Tenn. Code Ann. § 47-2-725, which provides for a four year statute of limitations. However, a claim accrues under this statute "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Tenn. Code Ann. § 47-2-725(2).

Therefore, because all of the equipment involved in this dispute is at least four years old, all of the plaintiffs' claims

are time-barred by the various three and four year statutes of limitations. The only exception would be if the plaintiffs can show: (1) that their claims accrued later than four years ago; (2) that the statutes were tolled by the fraudulent concealment of the hazards by the defendants; or (3) that CERCLA applies, and establishes a different statute of limitations than those provided by Tennessee Law.

C

Ordinarily, a claim accrues when the plaintiffs discover their injury or "through the exercise of reasonable care and diligence [it] should have been discovered." *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487, 491 (Tenn. 1975). In the instant case, the trial judge found that, at the very latest, the claims accrued in 1976. However, the plaintiffs argue, first, that the claims did not accrue until July 1985; and second, that the statutes of limitations were in any event tolled by the fraudulent concealment of the hazards by the various defendants. The initial complaint in this action was filed on August 23, 1985. Thus, unless the claims accrued after 1981 in the case of the warranty claim, and 1982 in the case of the tort claims, those claims are barred, as the trial court found they were.

As regards the warranty claim, the claim accrues "when tender of delivery is made" regardless of the lack of knowledge of the breach. Tenn. Code Ann. § 47-2-725(2). Thus, if a breach of warranty occurred at all, it occurred when the equipment was sold. *Clark v. DeLaval Separator Corp.*, 639 F.2d 1320, 1324-25 (5th Cir. 1981). Therefore, any claim for breach of warranty by either plaintiff regarding equipment purchased more than four years ago is barred. The defendants contend that all of the equipment was purchased more than four years before this suit was commenced. The plaintiffs did not contest this allegation below or on appeal. Thus, we agree with the conclusion

of the district court that all breach of warranty claims are barred by the statute of limitations.

As regards the tort claims, the question of when the claims accrued is more complex. The utilities make two arguments regarding this issue: first, they content that they did not know of the hazards of PCBs *in electrical equipment* until July 1985, when the EPA finally declared that use of PCBs to be hazardous. Second, they contend that the defendants fraudulently concealed the hazards from the utilities and the EPA, and so the statutes of limitations should have been tolled under equitable principles.

As regards the first argument, the trial judge found as fact that the utilities knew or should have known of the hazards of PCBs by 1976 at the latest. We do not find it necessary to specify the earliest date on which we believe the utilities knew or should have known of the hazards of PCBs in electrical equipment. It is sufficient to conclude that the record shows with crystalline clarity that the utilities had *actual* knowledge of the hazards of PCBs as used in electrical equipment more than the utilities participated in the public rulemaking procedures conducted by the EPA, and opposed restrictions on the use of PCBs in their equipment consistently, during the 1970s and early 1980s. For example, the interdepartmental Task Force issued a March 1972 report which recognized that the principal use of PCBs was in electrical equipment, and addressed the possible hazards of such use. In March 1980, based on the reports submitted by utility industry representatives that PCBs tended to "weep" or "sweat" from electrical equipment, the EPA published a notice in the Federal Register specifically requesting information on the incidence and hazards of such leaks from utility companies. The utilities admit that they closely monitored all EPA proceedings relating to PCBs; thus, we may assume that they saw this notice. The utilities had every reason to become wary of the use of PCBs in electrical equipment by March 1980

at the latest. This is more certain in light of the District of Columbia Circuit's decision in *Environmental Defense Fund v. EPA*, 636 F.2d 1267, 1284-86 (D.C.Cir. 1980), in which that court made it clear that transformers and the other types of equipment at issue here are not totally enclosed uses of PCBs, and so are not entirely protected uses.

The utilities' arguments to the contrary appear to be specius. The utilities opposed the further regulation of the use of PCBs in electrical equipment because they were concerned about the costs that might result from such regulation. When the regulation they had feared was passed in 1985, only then did they become outwardly concerned about the hazards of their uses of PCB equipment and PCB contaminated equipment. This turnabout on the part of the utilities diminishes the credibility of their claims.

This situation can be analogized to what we have called a "traumatic event/latent injury" case. *Hicks v. Hines, Inc.*, 826 F.2d 1543, 1544 (6th Cir. 1987). In *Hicks*, the plaintiff suffered injuries due to exposure to caustic chemicals in his work place. Some of his injuries manifested themselves in 1979; however, almost four years later, the plaintiff developed cancer and attempted to recover damages for this injury. We drew a distinction in that case between "traumatic event/latent injury" cases and "latent injury" cases, in which neither the cause nor the consequences of the injury can be identified until the injury manifests itself. *Id.* at 1545. Although we recognized that it might be difficult for a plaintiff to sue for both existing and potential future injuries, we held that once a plaintiff is on "notice of the invasion of his legal rights," *ibid.* (quoting *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223, 232 (5th Cir. 1984)), the statute of limitations begins to run, even if all injuries stemming from the traumatic event have not manifested themselves by the end of the running of the statute of limitations. Here, the "traumatic event" analog was general knowledge of the danger of

PCBs in electrical equipment. Thus, we find that the district court was correct in determining that the plaintiffs' claims had accrued at least four years before the instant suit was filed.

D

Our holding that the utilities knew of the hazards of PCBs in electrical equipment at least four years before they filed the instant suit negates their fraudulent concealment argument. This court has long held that, to prove fraudulent concealment for the purposes of tolling a statute of limitations, a party must show: "(1) wrongful concealment of their actions by defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (citation omitted); *Pinney Dock and Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988) (citing *Dayco*, 523 F.2d at 394). Further, "[c]oncealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Pinney Dock*, 838 F.2d at 1467 (citing *Wood v. Carpenter*, 101 U.S. 135, 143 (1879)). Although this court was reluctant to extend the "affirmative acts" requirement beyond cases involving breaches of fiduciary duties, *id.* at 1471, the Tennessee courts have not been so reluctant. The Tennessee Supreme Court has stated that a finding "that the defendant took affirmative action to conceal his cause of action" is necessary to maintain a claim of fraudulent concealment. *Vance v. Shulder*, 547 S.W.2d 927, 930-31 (Tenn. 1977) (citations omitted); *Willis v. Smith*, 683 F.2d 682, 688 (Tenn. App. 1984).

Here, the utilities assert that Monsanto "conspired" with a testing laboratory to present falsified studies to the EPA. Their only proof of this "affirmative action" is that Monsanto employees had been convicted for similar behavior

in the past with respect to other chemicals. *United States v. Keplinger*, 776 F.2d 678 (7th Cir. 1985). The utilities further assert that the defendants acted in concert to conceal information from the EPA, and thus from the utilities, to conceal the plaintiffs' causes of action.

There is one major flaw in the plaintiffs' arguments. Even if the defendants took "affirmative action" to conceal the hazards of PCBs in their use in electrical equipment, the utilities cannot meet the second requirement for making out a claim of fraudulent concealment. The trial judge held that the utilities knew or should have known of the hazards by 1976. This court's conclusion is that they knew at the latest by 1980. However, in either case, the utilities knew or should have known of the hazards of the use of PCBs in electrical equipment at least four years before their suit was filed. Thus, they cannot show that they failed "to discover the operative facts that are the basis of [their] cause of action within the limitations period." *Dayco*, 523 F.2d at 394. Therefore, the utilities cannot make out a claim of fraudulent concealment.

In sum, then, the applicable statutes of limitations bar all of the claims alleged in this suit. Thus, the trial court was correct in granting summary judgment to the defendants—unless the utilities are correct that CERCLA negates the effects of the state statutes of limitations.

E

42 U.S.C. § 9658 provides:

> (a) State statutes of limitations for hazardous substance cases.
>
> > (1) Exception to state statutes. In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contami-

nant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such state statute.

(2) State law generally applicable. Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

* * * *

(b) Definitions. As used in this section—

* * * *

(4) Federally required commencement date.

(A) In general. Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant contaminant concerned.

The defendants claim that this provision of CERCLA does not apply because the PCBs in this case are allegedly leaking from electrical equipment rather than being "*re-*

leased into the *environment* from a *facility*." 42 U.S.C. § 9658(a)(1) (emphasis added). However, even if CERCLA applies to this case, the "federally required commencement date" is virtually identical to the notion of an accrual date under Tennessee law, as discussed above. CERCLA would require a party to commence his or her claim when the party knew or should have known of the cause of action, 42 U.S.C. § 9658(b)(4), as would Tennessee law. *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487, 491 (Tenn. 1975). As discussed above, that date was at least four years before the suit was filed. Thus, because the instant suit was not commenced until at least four years later, CERCLA's statute of limitations would bar the instant action, just as the Tennessee statutes do. Since accrual in Tennessee occurs at the same time under CERCLA—when the plaintiff knew or should have known of the availability of the claim—application of CERCLA would not change the result in this case. We find that further analysis of the applicability of CERCLA is unwarranted.

IV

Thus, the applicable Tennessee statutes of limitations bar all of the plaintiffs' claims. Plaintiffs' arguments regarding the accrual date of their causes of action, fraudulent concealment, and CERCLA do not save their claims from this determination. Therefore, we AFFIRM the judgment of the district court dismissing all claims as time-barred.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88-5372

ELECTRIC POWER BOARD OF CHATTANOOGA, a Board of the City of Chattanooga, a Municipal Corporation; HUNTSVILLE ELECTRIC UTILITIES BOARD, a Board of he City of Huntsville, Alabama, a Municipal Corporation,
Plaintiffs-Appellants

v.

MONSANTO COMPANY; ALLIS-CHALMERS CORPORATION; GENERAL ELECTRIC COMPANY; MCGRAW-EDISON COMPANY; CENTRAL MOLONEY, INC.; WAGNER ELECTRIC CORPORATION; WESTINGHOUSE ELECTRIC CORPORATION; SANGAMO ELECTRIC CORPORATION,
Defendants-Appellees

FILED

AUG 17 1989

LEONARD GREEN, Clerk

ORDER

BEFORE: ENGEL and BOGGS, Circuit Judges; COHN, District Judge.*

Upon consideration of the appellant's motion for an extension of time to file the petition for rehearing,

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* The Honorable Avern Cohn, District Judge for the Eastern District of Michigan, sitting by designation.

It is ORDERED that the motion be and it hereby is GRANTED.

The court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88-5372

ELECTRIC POWER BOARD OF CHATTANOOGA, a board of the city of Chattanooga, a municipal corporation, HUNTSVILLE ELECTRIC UTILITIES BOARD, a board of the city of Huntsville, Alabama, a municipal corporation,
Plaintiffs-Appellants,

v.

MONSANTO COMPANY, et al.,
Defendants-Appellees.

Before: ENGEL, Chief Judge; BOGGS, Circuit Judge; and COHN, District Judge.

FILED

JUL 14 1989

LEONARD GREEN, Clerk

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

/s/ Leonard Green
Clerk

A TRUE COPY
Attest:
LEONARD GREEN, Clerk

By /s/ Patricia J. Elder
Deputy Clerk

Issued as Mandate:
AUGUST 28, 1989

COSTS: $360.00 (to be recovered by appellee)

Filing fee ..... $
Printing ..... $
Total ..... $

A True Copy.

Attest:

_____

Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

CIVIL ACTION NO. 1-85-634
Judge Thomas G. Hull

ELECTRIC POWER BOARD OF CHATTANOOGA, et al.,
Plaintiffs,

v.

MONSANTO COMPANY, et al.,
Defendants.

FILED

FEB 29 5:15 PM '89

KARL D. SAULPAW, JR. CLERK

BY _____
DEP. CLERK

ORDER OF SUMMARY JUDGMENT AND DISMISSAL PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

It is hereby Ordered that the defendants' motions for summary judgment are GRANTED and the plaintiffs' claims are hereby dismissed with prejudice for the reasons set forth in the previous Orders of this Court, except as to those certain claims as to those items of equipment, materials, or incidents specifically identified in Appendix I to the Court's February 29, 1988, Order of Severance entered pursuant to Rule 21 of the *Federal Rules of Civil Procedure.*

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

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No. 89-694

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELECTRIC POWER BOARD OF CHATTANOOGA,
Petitioner,

—v.—

MONSANTO COMPANY, GENERAL ELECTRIC COMPANY, MCGRAW-EDISON COMPANY, CENTRAL MOLONEY INC, WAGNER ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, SANGAMO ELECTRIC CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. Is there any basis for this Court to grant *certiorari* here, where the Court of Appeals' decision is not in conflict with any other federal or state court decision and where the primary issue is whether the Sixth Circuit "erred" in deciding to apply the accrual date of a state statute of limitations rather than that of a federal statute, even though the concept of accrual is identical under both statutes and would yield the same outcome?

2. Should this Court grant *certiorari* when the question as to which the petitioner seeks review, namely, the correctness of the Sixth Circuit's application of a state statute of limitations, would require this Court to review concurrent findings of fact by the two courts below concerning the dates on which petitioner's claims accrued?

Parties to Proceedings Below

Plaintiffs--Appellants:

Electric Power Board of Chattanooga
Huntsville Electric Utilities Board

Defendants—Appellees:

Monsanto Company
General Electric Company
McGraw-Edison Company
Central Moloney Inc
Wagner Electric Corporation
Westinghouse Electric Corporation
Sangamo Electric Corporation[1]

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1 Pursuant to Rule 19.6 of the Rules of the Supreme Court of the United States, the Electric Power Board of Chattanooga, in a notice dated November 15, 1989, notified all parties that neither the Huntsville Electric Utilities Board nor Sangamo Electric Corporation has any interest in the outcome of this petition.

Rule 28.1 Listing

Monsanto Company is an affiliate of Invitron Corporation and Southwall Technologies, Inc., both publicly owned corporations.

General Electric Company has no parent company. The subsidiaries of General Electric Company which have any outstanding equity or debt securities that are publicly held are:

RCA Corporation
General Electric Credit Corporation
General Electric Credit International, N.V.
Canadian General Electric Company, Ltd.
General Electric Overseas Capital Corporation

McGraw-Edison Company's parent company is Cooper Industries, Inc.

Central Moloney Inc's parent company, by merger, is Colt Industries Inc.

Wagner Electric Company's parent company is Cooper Industries, Inc. In 1979, McGraw-Edison Company acquired Studebaker-Worthington, Inc. which included Wagner Electric Company. McGraw-Edison Company was acquired by Cooper Industries, Inc. in 1985.

Westinghouse Electric Corporation has no parent company. The subsidiaries and affiliates of Westinghouse Electric Corporation are:

ADEPT Technologies
AEG-Beteiligunsgesellschaft MBH
AEG-Westinghouse Transportation Systems, Inc.
Airship Industries, Ltd.
Computer Aided Training Company, Inc.
Electromar Industria Electrica Brasileira, S.A.
Electromar Nordeste, S.A.
Email Westinghouse Pty., Ltd.
Enwesa Servicios, S.A.
Eregli Demir ve Celik Fabrikalori, A.S.

Escorts, Ltd.
Gamma Metrics
Industria IEM, S.A. de C.V.
Infrared Fiber Systems, Inc.
Innovative Technologies Inc.
Inova Microelectronics, Inc.
Integrated Communication Systems Inc.
Integrated Power Corporation
Mecanica Pasada, S.A.
Mex Control S.A. de C.V.
Micros Systems Inc.
Mictron, Inc.
Mirwec Film, Inc.
Mitsubishi Nuclear Fuel Co., Ltd.
Powerex, Inc.
Project Funding Corporation
Serratosa & Castells, S.A.
Siam Toracato de Tella, Ltd.
Silectra S.A. de C.V.
Speech Plus
Texas PFC, Inc.
Theta J Corporation
Turbine Metal Technologies, Inc.
Tyree Industries Limited
Westralian Transformers Pty. Limited
United Western Technologies Corp.
Vektron S.A.
W. S. Industries (India) Ltd.
Westinghouse Airship Industries, Inc.
Westinghouse de Argentina, S.A.
New Trends Corporation
Porta Pack Corporation
Country American Corporation
Horizon International Television, Inc.
Sutro Towers, Inc.
Metron, Inc.
Harbinger*EDI Services, Inc.
Industrias Electronica, S.A. (INDELEC)
Westinghouse Electro Metalurgicas C.A. (WEMCA)

Westinghouse do Brasil S.A. (WEBSA)
Electromar Industria Electrica Brasileira, S.A.
Westinghouse Electric Australia Holdings Ltd.
Email Westinghouse Private, Ltd.
Email Westinghouse Properties
Contadores Electricos, C.A. (CONTELCA)
Elektrik Techizati Imalti Tesisati, A.S.
Horiba Westinghouse, Ltd.
Hyosung Heavy Industries, Ltd.
Industria Electrica de Mexico, S.A.
Industria et Technologie de la Machine Intelligentie (ITMI)
ISCOSA Industries and Maintenance, Ltd.
Maihak A.G.
Reftrans, S.A.
Societe Generale de Travaux Electriques (SGTE)
ETIC BV Rotterdam
Westinghouse de Argentina, S.A.
Westinghouse Asia Controls Corporation (WEASIA)
Cemac Westinghouse Pty. Ltd.
Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)
Westinghouse Plasma Systems International, N.V.
Westinghouse Saudi Arabia Ltd. (WSAL)
Westinghouse Motor Company
WEXICO Systems and Services, Ltd.

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IN THE

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OCTOBER TERM, 1989

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Petitioner,

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MONSANTO COMPANY, GENERAL ELECTRIC COMPANY, MCGRAW-EDISON COMPANY, CENTRAL MOLONEY INC, WAGNER ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, SANGAMO ELECTRIC CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Electric Power Board of Chattanooga ("EPB") has asked this Court to issue a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on July 14, 1989. Because the decision of the Sixth Circuit is correct and does not raise any questions that are worthy of review by this Court, respondents Monsanto Company, General Electric Company, McGraw-Edison Company, Central Moloney Inc, Wagner Electric Corporation, and Westinghouse Electric Corporation (collectively the "respondents") urge the Court to deny the Petition for a Writ of *Certiorari*.

STATEMENT OF THE CASE

This case concerns properly functioning electrical equipment, the overwhelming majority of which was purchased over ten years before the complaint was filed, and some of which was purchased as long as fifty years ago. Petitioner's claims were based on the mere presence in that equipment of polychlorinated biphenyls ("PCBs") and on the restrictions allegedly placed on the equipment by regulations issued by the Environmental Protection Agency ("EPA"). Because its claims were subject to dismissal under the pertinent Tennessee statutes of repose and limitations,[2] petitioner sought to circumvent these statutes by trying unsuccessfully to force the facts of the case into various legal theories which it argued would have saved its claims. First, petitioner alleged that the statutes were tolled by respondents' alleged fraudulent concealment of the alleged dangers of PCBs. When it appeared that this argument would be rejected because, as both the district court and the Sixth Circuit found, petitioner knew of the alleged hazards of PCBs "at the latest by 1980" (Pet. App. at 17a),[3] petitioner shifted its theory of the case to one based on property damage, alleging a cause of action based on the "weeping" or leaking of PCBs, which occurs during the normal operation of electrical equipment. Both the district court and the Sixth Circuit rejected these arguments and petitioner's claims were dismissed accordingly.

The dismissal of petitioner's claims by the district court and the Sixth Circuit's affirmance of that dismissal were based on

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2 The Tennessee Statute of Repose for products liability claims, T.C.A. § 29-28-102(6), bars all claims relating to products purchased over ten years before the filing of the complaint. Tennessee's statute of limitations for breach of warranty claims, T.C.A. § 47-2-725(2), is four years. Tennessee's statute of limitations for tort claims, T.C.A. § 28-3-105, is three years. All of petitioner's equipment was sold to it by August 1981, and most of it was sold to it by August 1975. Petitioner's complaint was filed on August 23, 1985.

3 References to the Sixth Circuit decision contained in the Petitioner's appendix are referred to herein as "Pet. App. at _____." References to the Petition are referred to herein as "Pet. at _____."

factual determinations concerning what petitioner knew about its injuries, and when petitioner knew it. Specifically, both the district court and the Sixth Circuit, relying on a massive and undisputed factual record,[4] held that petitioner's claims were time-barred under the applicable state statutes of limitations because the alleged dangers of PCBs, including the propensity of PCB equipment to leak, were actually known to petitioner and were a matter of public record for many years before it filed its complaint.[5] In reaching its decision, the Sixth Circuit concluded that there was no basis for applying the accrual date of a federal statute, the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), which EPB argued would have saved its claims, because the accrual date under SARA was identical to that of the state statute of limitations. (Pet. App. at 19a). This conclusion did not implicate or in any way involve any constitutional or other far-ranging provisions of law. Nor was it inconsistent with any decisions of other federal courts. Indeed, petitioner expressly acknowledges that the Sixth Circuit's decision is "the sole decision by a federal court of appeals on this point." (Pet. at 11; *see also* Pet. at 14, 15).

EPB nevertheless submitted a petition for *certiorari*, asserting that this Court should consider this case because the Sixth Circuit was supposedly "in error" (Pet. at 15) in deciding not to substitute the accrual date of the pertinent SARA provision, under which, according to EPB, its claims would have accrued later than under the Tennessee statute of limitations. (Pet. at 15). EPB's position is without merit.

First, this Court does not sit as a "court of error" and should not be reviewing a case simply because the petitioner believes it was wrongly decided. This is especially so where, as the petitioner admits, the decision below is "the sole appellate interpre-

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4 The record in this case included 360 filings and was approximately 5,000 pages long.

5 The district court held that petitioner's claims were barred by the Tennessee Statute of Repose. The Sixth Circuit held that petitioner's claims were barred under Tennessee's tort and warranty statutes of limitations and, therefore, did not need to address whether the claims were also barred by the Tennessee Statute of Repose.

tation" of the provision that purportedly was wrongly construed. (Pet. at 15). *Second*, the issue raised by EPB was *not* wrongly decided and is merely a red herring. The legislative history of SARA clearly reflects that the SARA provision at issue, 42 U.S.C. § 9658(b)(4), was intended to superimpose a discovery-based accrual date on those few states which do not already have one, and by its terms, the section may be invoked only if its accrual date is later than the accrual date under the state statute of limitations. *See infra* point IB. As the Sixth Circuit recognized, however, the Tennessee tort statute of limitations applicable to petitioner's claims is subject to a discovery rule identical to that of § 9658, and its application yields the same result as would application of § 9658. Thus, under either statute, EPB's claims would be barred because it knew or should have known of its alleged injuries many years before it filed its claims.

Indeed, the actual source of EPB's disagreement with the decision is not the Sixth Circuit's construction of the federal statute but the factual determinations which underlay the Sixth Circuit's application of the Tennessee statute of limitations, *i.e.*, determinations regarding the dates and nature of EPB's injuries, and its knowledge of such injuries. Such fact-based determinations do not represent important questions of law which this Court should consider.

Statement of Facts

The equipment at issue in this case consists of thousands of transformers which allegedly contained PCBs. The undisputed record reflects that all of this equipment was purchased more than four years before the commencement of this litigation and that the vast majority was purchased well over ten years before the filing of the action.[6] The record also reflects that, as a result of Congressional hearings, government reports and EPA

6 *See* R. 306: Def. Mem. in Support of Joint Motion to Enforce, Exh. 2. *See also*, R. 120: EPB Response No. 1 to GE Requests for Admission at 1-2; R. 83: EPB Supp. Answers to GE Interrogatories; R. 78: EPB Supp. Answers to McGraw-Edison Interrogatories; R. 81: EPB Supp. Answers to Wagner Electric Interrogatories.

notices and regulations, the alleged dangers resulting from the presence of PCBs in such equipment have been a matter of public knowledge since the 1970's. (Pet. App. at 9a). Part of that public record included an EPA notice issued in March 1980, which was based on reports submitted by utility industry representatives that PCBs tend to "weep" or "sweat" from electrical equipment during their normal operation, and which specifically requested information on the incidence and hazards of such leaks. (Pet. App. at 9a). The "weeping" and "sweating" addressed in that notice and in those reports are precisely the type of "property damage" which petitioner alleged in this case.

Petitioner admitted before the courts below that it reviewed and monitored the public record and proceedings concerning PCBs on a regular basis and has been aware since at least 1976 that PCBs may be hazardous.[7] Petitioner also admitted to the court below that PCB transformers leak "during normal operation" and that they knew this fact years ago.[8]

The District Court's Rulings

In a series of decisions which addressed the public record on PCBs and the key statute of limitations issues raised by that record, the district court dismissed petitioner's claims as time-barred. In those decisions, the court rejected petitioner's arguments that the pertinent statutes of repose and limitations were tolled by respondents' alleged fraudulent concealment of the hazards of PCBs, concluding that petitioner had actual knowledge of the hazards of PCBs at least since 1976.[9]

In an effort to avoid the first of the court's rulings that its claims were time-barred, petitioner amended its complaint and shifted its theory of the case from one based on the alleged restrictions on its equipment set forth in the EPA regulations to

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7 *See* R. 298: Order, April 30, 1987 at 3; R. 260: Affidavit of Ronald N. Fugatt ("Fugatt Aff.") ¶¶ 6-10; R. 260: Affidavit of Harold DePriest ("DePriest Aff.") ¶ 3.

8 *See* R. 260: DePriest Aff. ¶ 10.

9 *See, e.g.*, R. 298: Order, April 30, 1987 at 3.

one based on "property damage". This new focus was based on the SARA amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which were enacted only weeks before petitioner shifted its theory of the case. SARA provides for the preemption of state statutes of limitations for property damage and personal injury claims arising from a "release into the environment" of a "hazardous substance". With respect to such claims, the statute provides for a discovery-based accrual date (the "federally required commencement date") which preempts state statutes of limitations in those circumstances when a claim accrues earlier under the state statutes of limitations than it does under the federally required commencement date. *See* 42 U.S.C. § 9658.

Petitioner moved to modify and reverse the district court's order based on these SARA amendments, alleging, for the first time, that in 1982 they had observed "property damage" caused by leaks from 106 PCB transformers onto the floors of vaults in which the equipment was contained.[10]

The district court rejected petitioner's property damage claims, stating that the alleged "leaks" were not "releases into the environment" within the meaning of CERCLA and noting that petitioner was "attempting to force the facts of [the] case into CERCLA reasoning . . . ."[11]

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10 R. 260: Fugatt Aff. ¶ 6. Petitioner's initial attempt to construct a property damage claim within SARA was premised upon the pouring of PCBs into the equipment at issue by the respondents at their own facilities. R. 250: Response of EPB to Sangamo' otion for Summary Judgment at 11; *see also* R. 216: Memorandum in Support of Motion of Plaintiffs to Modify Order on Statute of Repose Issues at 7; R. 220: Plaintiffs' Response to Defendants' Memorandum in Opposition to Motion of Plaintiffs to Modify Order at 5-6. The district court rejected these claims and petitioner subsequently abandoned them.

11 R. 274: Order, February 19, 1987 at 3; *see also* R. 298: Order, April 30, 1987 at 2.

The Sixth Circuit Decision

The Sixth Circuit affirmed the district court's decision, rejecting both petitioner's fraudulent concealment and CERCLA arguments. The Sixth Circuit held that "[petitioner] had *actual* knowledge of the hazards of PCBs as used in electrical equipment" more than three years before they filed this suit (Pet. App. at 14a) (emphasis in original) and stated that petitioner's arguments to the contrary were "specious". (Pet. App. at 15a). In addressing the evidence of petitioner's prior knowledge of the alleged hazards of PCBs, the court reiterated the extensive public record on the dangers of PCBs, and singled out, as part of that record, the EPA's March 1980 notice, which requested information from utilities about the incidence and hazards of electrical equipment leaks. (Pet. App. at 15a). After observing that petitioner monitored EPA regulations relating to PCBs, and therefore presumably was aware of this notice, the court stated that petitioner "had every reason to become wary of the use of PCBs in electrical equipment by March 1980 at the latest." (Pet. App. at 14a-15a).

The Sixth Circuit then stated that the application of CERCLA and, in particular, the "federally required commencement date", to petitioner's claims would not change the result in the case because the federal accrual date "is virtually identical to the notion of an accrual date under Tennessee law". (Pet. App. at 19a). The court noted that under both CERCLA and the Tennessee statutes of limitations, petitioner's claims accrued when it knew or should have known of its cause of action (*i.e.*, when petitioner knew or should have known of the alleged "leaks" or "releases into the environment"). (Pet. App. at 19a). Accordingly, presented with petitioner's own statements that PCB equipment leaks during normal operation, the public record concerning the propensity of PCB equipment to leak during normal operation and the undisputed evidence of petitioner's knowledge of this public record, the court ruled that petitioner's property damage claims would be time-barred under either CERCLA or the Tennessee statute of limitations, thereby rendering application of CERCLA unnecessary.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO ISSUES WARRANTING SUPREME COURT REVIEW

The EPB contends that the Sixth Circuit erred in its interpretation of 42 U.S.C. § 9658 and ignored certain facts which allegedly established that EPB's injuries occurred within the period of limitations. The petition should be denied because it meets none of the requirements governing review on *certiorari* set forth in Rule 17. It does not involve a conflict either among the circuits or with any state court. Indeed, EPB admits that the Sixth Circuit's decision "is the only decision of which we are aware" that even addresses the issue EPB attempts to raise in this petition. (Pet. at 14). Nor does the petition present an important question of federal law with a potentially broad effect.

In fact, the entire petition is nothing more than an extended argument as to why the Sixth Circuit's decision was supposedly wrong on the merits. That argument requires this Court to review the validity of certain factual determinations made by the courts below—clearly an inappropriate task for this Court to undertake. In this case, moreover, such factual review would violate the longstanding rule that "this Court . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). Thus, a grant of *certiorari* would not only be unwarranted, but improper.

In addition, petitioner's claim that the Sixth Circuit's construction of § 9658 was erroneous is simply incorrect.

First, the Sixth Circuit did not rule that EPB's property damage claims accrued before the date of its injuries, and EPB's arguments to the contrary turn on a mischaracterization of the Sixth Circuit's analysis of the factual record.

Second, the accrual date for EPB's claims under the Tennessee statute of limitations is identical to the "federally required commencement date", and, therefore, the outcome of the case would have been the same regardless of which accrual date had been applied.

Third, the courts which have considered the issue of what constitutes a "release into the environment from a facility" within the meaning of § 9658 have unanimously concluded that § 9658 has no application to the factual circumstances presented by this case for reasons not addressed by the Court of Appeals.

A. The Sixth Circuit Did Not Hold That EPB's Claims Accrued Before The Date Of Its Alleged Injuries

EPB's entire petition is premised on the contention that, in applying the Tennessee statute of limitations to bar its claims for alleged property damage, the Sixth Circuit held that EPB's claims accrued before the date of its alleged injuries (*i.e.*, before the alleged release of a hazardous substance). An examination of the Sixth Circuit's decision in light of the factual record, however, demonstrates clearly that this is not what the Sixth Circuit ruled.

The extensive and undisputed record before both the district court and the Sixth Circuit reflects, *inter alia*, that EPB monitored and reviewed the public record and proceedings concerning the alleged hazards of PCBs on a regular basis and was aware of such hazards, including the propensity of PCB equipment to leak, for many years prior to the filing of their complaint. The incidence and hazards of leaks from PCB equipment have been the subject of EPA notices and regulations since at least March 1980. (Pet. App. at 14a). Moreover, EPB has admitted in its own submissions that leaks from PCB equipment, including its own such equipment, much of which has been in use for over thirty years, occur "during normal operation"[12] and are, therefore, common occurrences.

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12 R. 260: DePriest Aff. ¶ 10.

As the Sixth Circuit recognized, tort claims under Tennessee law accrue "when a plaintiff knows or reasonably should know that he has a cause of action against a defendant." *Mackey* v. *Judy's Foods, Inc.*, 654 F. Supp. 1465, 1471 (M.D. Tenn. 1987), *aff'd*, 867 F.2d 325 (6th Cir. 1989). Thus, when presented with the above record, the Sixth Circuit concluded that all of petitioner's claims, including its claims for property damage, were time-barred under Tennessee's statute of limitations because it knew or should have known of the availability of such claims long ago.[13] The Sixth Circuit did not hold that a claim could accrue under the Tennessee statute of limitations *before* the date of the injuries (*i.e.*, before the release of the hazardous substance).[14] To the contrary, the Sixth Circuit's explicit references to the EPA's public notice to the utilities concerning leaks from PCB equipment (Pet. App. at 9a) reflect that its decision was based on the reasoned conclusion that the types of leaks in question occurred years before the filing of the complaint and should have been known to EPB at least as early as March 1980.

Moreover, the Sixth Circuit's conclusions as to when EPB's claims accrued are heavily fact-based determinations which were rooted in a careful analysis of the record. Such determinations include findings concerning the dates of EPB's alleged injuries and its knowledge of those alleged injuries. Clearly, such findings should not be the subject of this Court's review.

That EPB's current quarrel is not with the Sixth Circuit's legal conclusions but with its factual determinations is further

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13 The court's conclusion was consistent not only with the case law of Tennessee but also with numerous jurisdictions which subscribe to the same concept of accrual as does Tennessee. In those jurisdictions, a plaintiff with the means of knowing the extent or cause of his injuries has a duty to inquire about such injuries, and breach of that duty results in the running of the statute of limitations. *See, e.g., Herrera-Diaz* v. *United States Dept. of Navy*, 845 F.2d 1534, 1537 (9th Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 306 (1988); *Huff* v. *Fibreboard Corp.*, 836 F.2d 473, 479 (10th Cir. 1987).

14 As the Sixth Circuit recognized, under Tennessee law a tort claim *cannot* accrue until the injury occurs. *See, e.g., Potts* v. *Celotex Corp.*, 703 F. Supp. 672, 673 (E.D. Tenn. 1988).

evidenced by its suggestion that its property damage claims based on alleged leaks "arose" within three years of the date of the complaint. (*See* Pet. at 10-11; *see also* Pet. at 9, 15). This position was not originally argued before the Sixth Circuit and was submitted to that court for the first time only in EPB's petition for rehearing. EPB's prior assertions in affidavits and briefs concerning the alleged leaks merely stated that upon inspection of certain PCB transformers in 1982, some of those transformers were "found to have leaks."[15] EPB never asserted in those papers that the leaks did not *occur* until after November 1982 and thus that no claim could have arisen until after that date.

B. The Commencement Date Under State Law Is Identical To The "Federally Required Commencement Date"

EPB contends that the Sixth Circuit should have applied the "federally required commencement date" contained in § 9658 to its claims for property damage, rather than the accrual date of the Tennessee statute of limitations. That contention, however, presumes that there is a distinction between the accrual date under the Tennessee statute of limitations and the federally required commencement date. (Pet. at 13-14). In fact, such a distinction does not exist, and there is no basis for the distinction in either Tennessee law, the language of the Sixth Circuit's decision, or the legislative history of § 9658.

Under Tennessee law, statutes of limitations for all tort claims, including claims for property damage, are subject to a judicially created "discovery rule". *McCroskey* v. *Bryant Air Conditioning Co.*, 524 S.W.2d 487, 491 (Tenn. 1975). As noted above, under this rule, such claims accrue "when a plaintiff knows or reasonably should know that he has a cause of action against a defendant." *Mackey* v. *Judy's Foods, Inc.*, 654 F.

15 R. 260: Fugatt Aff. ¶ 6; *see also* R. 259: Plaintiffs' Response to Westinghouse Electric Corporation's Motion for Summary Judgment at 5-7; R. 291: Affidavit of Ronald N. Fugatt ¶¶ 3-5; R. 293: Memorandum in Support of EPB's Motion to Modify March 20, 1987 Order at 2-6; and R. 322: Plaintiffs' Response to Defendants' Joint Motion to Enforce April 30, 1987 Order at 9.

Supp. 1465, 1471 (M.D. Tenn. 1987), *aff'd*, 867 F.2d 325 (6th Cir. 1989). Moreover, contrary to EPB's assertion, state law requires more than mere knowledge (or in this case, mere notice) of the injury before the statute begins to run. The would-be plaintiff must have knowledge of the existence of his cause of action against the tort-feasor, that is, knowledge of both the injury and its cause:

> [T]he discovery rule in Tennessee requires the discovery of the existence of a right of action, *i.e.*, facts which would support an action for tort against the tortfeasor—these facts include not only the existence of an injury, *but the tortious origin of the injury.*

Potts v. *Celotex Corp.*, 703 F. Supp. 672, 673 (E.D. Tenn. 1988) (emphasis supplied).

As the Sixth Circuit correctly concluded, the federally required commencement date reflects the identical concept of accrual. Thus, the language of § 9658 contains the critical "knows or reasonably should have known" language common to all discovery rules.[16] Indeed, the legislative history of § 9658 reflects that the very purpose of the provision was to establish the type of discovery statute of limitations for certain property damage claims which was already in place in Tennessee.[17] As demonstrated in a special report prepared for Congress by a group organized to study the ramifications of the then proposed § 9658, the intent of the statute was to superimpose a discovery

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16 Section 9658(b)(4)(A) states that the federally required commencement date "means the date the plaintiff *knew (or reasonably should have known)* that the . . . [property damages in question] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." (emphasis added).

17 *See* Superfund Section 301(e) Study Group, *Injuries and Damages from Hazardous Waste—Analysis and Improvement of Legal Remedies, A Report to Congress in Compliance with Section 301(e) of The Comprehensive Environmental Response, Compensation, and Liability Act of 1980* (P.L. 96-510), S. Rep. No. 97-12, 97th Cong., 2d Sess. ("Section 301(e) Report"), pt. 1 at 240. EPB recognized that § 9658 merely established "a discovery statute of limitations for toxic tort action brought in state court" in its brief before the Sixth Circuit. Plaintiffs' Appellate Brief at 37.

rule upon the "small number of states [which] still follow the so-called traditional rule that the cause of action accrues from the time of exposure" and "[a]nother small number of states [which] has not as yet clearly adopted either the traditional or discovery rule". Section 301(e) Report, pt. 1 at 240.

The Sixth Circuit was therefore correct in ruling that accrual of a property damage claim occurs at the same time under the Tennessee statute of limitations as it does under the federally required commencement date. Since there was no conflict between the federal and state rules, the federal provision is inapplicable by its own terms. Section 9658 states that the federally required commencement date for certain property damage claims shall be applied in lieu of the date specified by the state's statute of limitations only if the accrual date under the state's statute of limitations period is earlier than the federally required commencement date. § 9658(a)(1). In this case, the commencement dates under § 9658 and the Tennessee statute of limitations are the same, and the Sixth Circuit was required to apply the state statute of limitations.

C. The Courts Which Have Addressed The Issue Of What Constitutes A "Release Into The Environment From A Facility" Within The Meaning Of § 9658 Have Unanimously Concluded That § 9658 Does Not Apply To The Factual Circumstances Presented By This Case

The Sixth Circuit saw no need to address the separate question of whether the kind of leaks involved in this case constitutes property damage within the meaning of § 9658. However, if this Court were to conclude that the accrual date under § 9658 differs from that of the Tennessee statute of limitations, § 9658 still would not control the outcome of this case. All courts that have interpreted § 9658 in the context of the types of leaks alleged in this case have concluded that it has no application. The reasons articulated by these courts preclude application of § 9658 to the facts of this case.

First, § 9658 does not apply because a statutory prerequisite to the application of the statute, *i.e.*, a "release into the envi-

ronment from a facility", did not occur. *See* 42 U.S.C. § 9658(a)(1); 42 U.S.C. §§ 9601(8), (9), (22); R. 298: Order, April 30, 1987 at 2. As the district court found, the record does not support any claim that a hazardous substance, leaking from one facility (a transformer) into another (a vault housing the transformer), constituted a release "into the environment" as defined in the statute.[18] This is because the vaults into which the leaks occurred do not fit within any of the statutory categories defining "environment": navigable waters, surface water, groundwater, drinking water, land surface or subsurface strata, or ambient air. 42 U.S.C. § 9601(8). Other courts have reached the same conclusion.[19]

Second, § 9658 is inapplicable because this case could not give rise to an underlying CERCLA claim. Congress intended § 9658 to preempt state statutes of limitations only in "personal injury or property damage causes of action under state law in situations where there is an underlying CERCLA action providing for cleanup and remedial activities." *Knox* v. *AC&S, Inc.*, 690 F. Supp. 752, 757 (S.D. Ind. 1988). *See also Electric Power Bd. of Chattanooga* v. *Westinghouse Elec. Corp.*, 716 F. Supp.

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18 R. 349: Order, January 26, 1988 at 2.

19 *See Electric Power Bd. of Chattanooga* v. *Westinghouse Elec. Corp.*, 716 F. Supp. 1069, 1081 (E.D. Tenn. 1988) (Edgar, J.). In that case, the court concluded that "the leaking of a relatively small quantity of dielectric fluid" containing PCBs from a transformer into a vault is not "the type of release into the environment contemplated or intended by the CERCLA." *Id.*

Even more recently, the Seventh Circuit acknowledged that interpreting the term "environment" in such a way that a "release into the environment" occurs, for example, "the instant a container of asbestos is opened" would render the term meaningless. *Covalt* v. *Carey Canada Inc.*, 860 F.2d 1434, 1436 (7th Cir. 1988). Judge Easterbrook observed that:

> [s]uch a global treatment erases "released into the environment" as a limitation, however, by ensuring that it is always satisfied.
>
> . . .
>
> [I]t is hard to believe that "released into the environment" is an empty phrase.

860 F.2d at 1436-37.

at 1081. EPB has conceded that this case does not present an underlying CERCLA claim.[20]

Thus, § 9658 would not provide the rule of decision in this case in any event.

Conclusion

For the foregoing reasons the petition for a writ of *certiorari* should be denied.

Respectfully submitted this 22nd day of November, 1989.

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20 *See* R. 342: Pl. Reply to Def. Response at 4, 9.

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No. 89-694

(3)

Supreme Court, U.S.
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NOV 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELECTRIC POWER BOARD OF CHATTANOOGA,
Petitioner,

—v.—

MONSANTO COMPANY, GENERAL ELECTRIC COMPANY, MCGRAW-EDISON COMPANY, CENTRAL MOLONEY INC, WAGNER ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, SANGAMO ELECTRIC CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. Is there any basis for this Court to grant *certiorari* here, where the Court of Appeals' decision is not in conflict with any other federal or state court decision and where the primary issue is whether the Sixth Circuit "erred" in deciding to apply the accrual date of a state statute of limitations rather than that of a federal statute, even though the concept of accrual is identical under both statutes and would yield the same outcome?

2. Should this Court grant *certiorari* when the question as to which the petitioner seeks review, namely, the correctness of the Sixth Circuit's application of a state statute of limitations, would require this Court to review concurrent findings of fact by the two courts below concerning the dates on which petitioner's claims accrued?

Parties to Proceedings Below

Plaintiffs—Appellants:

Electric Power Board of Chattanooga
Huntsville Electric Utilities Board

Defendants—Appellees:

Monsanto Company
General Electric Company
McGraw-Edison Company
Central Moloney Inc
Wagner Electric Corporation
Westinghouse Electric Corporation
Sangamo Electric Corporation[1]

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1 Pursuant to Rule 19.6 of the Rules of the Supreme Court of the United States, the Electric Power Board of Chattanooga, in a notice dated November 15, 1989, notified all parties that neither the Huntsville Electric Utilities Board nor Sangamo Electric Corporation has any interest in the outcome of this petition.

Rule 28.1 Listing

Monsanto Company is an affiliate of Invitron Corporation and Southwall Technologies, Inc., both publicly owned corporations.

General Electric Company has no parent company. The subsidiaries and affiliates of General Electric Company that are not wholly owned are as follows:

A. P. - GERECCO Ltd.
Admiral Overseas
Airport Tech Center Associates
Amwest Associates
Arvada-Fremont Developers
Ashley Run Associates
Atrium V. Joint Venture
Azdel, Inc.
BMW Credit Corporation
Baconsfield Associates II
Bayou Cogeneration Plant
Bayou Partners Limited
Bethpage Cogeneration Limited Partnership
Blue Water Associates
Brandemere Associates I
Brandemere Associates II
Camden Cogeneration Limited Partnership
Campus Drive Venture
CBI Nuclear Company
CFC/GECC Associates II
CFE Company
CFM International, Inc.
Cardinal Cogen
Center for Advanced Television Studies
Center Stage I Associates
Century II
Chase Park Plaza
Cincinnati Office Building
Clinton Employment Center
Cool Water Coal Gasification Program

Cornell Center Partners
Cos Mar, Inc
Council Crossing
Dekalb Properties
Diamond Oaks Associates
Dobson Village I Associates
Earth Observation Satellite Company
Eastland
Ebbert's Homes VI
Ebbert's Homes VII
Equipment Financing Associates
Executive Center West Associates
FGIC Corporation
FSL/GECC Associates I
FSL/GECC Associates II
FSL/GECC Associates III
Financial Guarantee Insurance Company
Financo Investors Fund L.P.
Financo Investors Management Partnership L.P.
GECC/CFC Associates III
GECC/GFC Associates I
GECC Lease Fund No. 1 Limited
GECC Solar Leasing
GE Credit Auto Auction
GE Credit Auto Resales Services
GE Fanuc Automation Corporation
Gesco/Beaumont L.V.
Gleneagle Associates
Halfdan-Ditlev Simonson
Hearst/ABC-RCTV
High Voltage Breakers, Inc.
Highway 120
Holiday Pines
Holiday Pines Service Corporation
Huntington Apartments
Huntington Glen
Huntsman
Hydraulic Turbines, Inc.
Information Alliance Co., Inc.

Judiciary Center Investment, Limited
Keegan Road Associates
Kirby Fletcher Stamford, Ltd.
Kramer Capital Corporation
LCSSC Venture
Lincoln Dobson Village
Lincoln Mesa II Associates
Locke Insulators, Inc.
MVPPP - Mount Vernon Phenol Plant Partnership
Master Limited Partnership
Midwest Plaza Limited
Millicent Way Associates
Mint-Pac Technologies, Inc.
Mira Mesa R&D Associates
Montgomery Ward & Co., Incorporated
Montgomery Ward Holding Corporation
NBC/Top Shot Joint Venture
NCC Leasing
National Cash Register
Northcase One Associates
Northcase Two Associates
Northern Oaks Associates
Northern Telecom/General Electric Credit Associates
Northridge Pointe Associates
Oak Hollow II Associates
Otisca Industries, Limited
Ozona Development Drilling Partnership I
Ozona Development Drilling Partnership II
Ozona Development Drilling Partnership III
Park Place Developers, Ltd.
Patrick Petroleum Corporation Drilling Program No. 1
Patrick Petroleum Corporation South
Louisiana Five Well Investment Package
Pear Tree Joint Venture
Pellicano Business Center Associates
Pierremont Phase II Associates
Plum Tree Dallas Associates, Ltd.
Powers Pointe Associates
PTF/GECC Associates I

Pylon
Racom Corporation
R. C. Chapman
RCA/Columbia Pictures Home Video
RCA Columbia Pictures International Video
Regency Park Associates
Renner Plaza Associates
Resurgens Plaza
Richmond Office Building L.V.
Ringwood Avenue Joint Venture Assoc.
River Crossing
Rolling Hills Ranch
Sharon Road West Associates
Shinano Tokki General Corporation
SGE Associates I
SGE Associates II
Stations Associates
Summit Oakes Associates
TBG Cogen
Technology Park
The Settling Associates
Timberglen Associates
VHD Electronics, Inc.
Wainoco Appalachian Stamford, Ltd.
Walsh Land
Watkins Equity Leasing
Wiles Associates
Woodland Corporation Lower Associates
Osram Argentina Sociedad Anonima Comercial e Industrial
Medidores Argentinos, S.A.
COPLEN S.A. Industria e Comercio
Valmet-Dominion, Inc.
STL Corporation
The China Car and Foundry Company Limited (In Liquidation)
CFM International, S.A.
Fabrications Mecaniques de L'Atlantique S.A.
GE Fanuc Automation France, S.A.

Prodis, S.A.
SNEF Electro Mecanique (S.E.M.)
GE Fanuc Automation Deutschland GmbH
GE Fanuc Automation Management GmbH
Westdeutsche Quarzschmelze & Co. KG
Elpro International Limited
IGE Limited
GE Fanuc Automation Italia S.p.A.
Turbomotori Internazionale S.p.A.
C&C International, Ltd.
Drive System Company, Ltd.
Engineering Plastics, Ltd.
Eye Lighting Systems Corporation
Fanuc GE Automation Asia, Ltd.
GEM Chemicals, Ltd.
GEM Polymers Ltd.
Information Services International-Dentsu, Ltd.
Japan Nuclear Fuel Company, Limited
Toshiba Electronic Systems Co. Ltd.
Toshiba Silicone Company, Ltd.
Ube Cycon, Ltd
Daewoo Electric Motor Industries, Ltd.
Dongyang Silicone Co., Ltd.
GP Lighting Company, Ltd.
Kolon Electromaterials Co., Ltd.
Samsung Medical Systems
GE Fanuc Automation Europe S.A.
Brelec, S.A. de C.V.
Centro de Servicio Mabe, S.A. de C.V.
Comercial Consul, S.A. de C.V.
Comercial Friem, S.A. de C.V.
Comercial Mabe, S.A. de C.V.
Diesel Industrial y Tractiva S.A. de C.V.
Enseres Electroindustriales, S.A. de C.V.
Friem, S.A. de C.V.
General de Radio
Industrias Astral, S.A. de C.V.
Industrias MABE, S.A. de C.V.
Inyectora y Extrusora de Plasticos, S.A. de C.V.

Islo, S.A. de C.V.
Leiser, S.A. de C.V.
Mabesa, S.A. de C.V.
Operadora Confad, S.A. de C.V.
Operador Enselco, S.A. de C.V.
Organizacion Mabe, S.A. de C.V.
Productos Troquelados y de Alambre, S.A. de C.V.
Servej, S.A. de C.V.
Servicios Confad, S.A. de C.V.
Tragesa, S.A. de C.V.
Ultrapol, S.A. de C.V.
GB Fanuc Automation Benelux, B.V.
Donald Brown & Co. Ltd.
IGB of Nigeria Ltd.
Kvaerner-Calma A/S
A/S. Medirad
Philacor Credit Corporation
Philacor Realty and Development Corporation
Philippine Appliance Corporation
Philippine Glass Bulbs, Inc.
Pinagkaisa Realty Corporation
JAMJOOM Electrical Distribution Assemblies Company, Ltd.
Saudi American General Electric Company Limited
GE Fanuc Automation Espana, S.A.
GE Fanuc Automation AB
GE Fanuc Automation Switzerland A.G.
Taian Electric Manufacturing Company
United Asia Electric Company
CGR Turkey
TUSAS Motor Sanayii A.S.
GE Fanuc Automation Ltd.
International Network Services Limited
Mobile Images, Inc.
General Electric de Uruguay S.A.
Interruptores Especializados Lara, S.A.
Manufacturera de Aparatos Domesticos S.A.
Venezolana de Compresores y Motores S.A.
Vidriolux, C.A.

McGraw-Edison Company's parent company is Cooper Industries, Inc.

Central Moloney Inc's parent company, by merger, is Colt Industries Inc. Colt Industries is a privately held corporation. The privately held subsidiaries and affiliates of Colt Industries Inc are:

CII Holdings Inc
CFPI Inc (formerly Fairbanks Weighing Inc)
Colt's Patent Fire Arms Manufacturing Company, Inc.
Colt Industries International, Inc.
Delavan Inc
Delavan-Delta, Inc.
Delavan Limited
Delavan European Marketing Company
Walbar Inc
Walbar Canada Inc.
Garlock Inc
Garlock Bearings Inc
Garlock de Mexico, S.A. de C.V.
Garlock of Canada Ltd.
Garlock International Inc
Garlock A. G.
Garlock GMBH
Stemco Truck Products Pty. Limited
Garlock Pty. Limited
Garlock S. A.
Louis Mulas Sucs, S.A. de C.V.
Stemco Inc
Garlock Limited
The Anchor Packing Company
Menasco Aerospace Ltd.
M A Aviotec Ltee
Pennsylvania Coal & Coke Corporation
Quincy Compressor Inc
Apollo Insurance Company

Wagner Electric Company's parent company is Cooper Industries, Inc. In 1979, McGraw-Edison Company acquired

Studebaker-Worthington, Inc. which included Wagner Electric Company. McGraw-Edison Company was acquired by Cooper Industries, Inc. in 1985.

Westinghouse Electric Corporation has no parent company. The subsidiaries and affiliates of Westinghouse Electric Corporation are:

ADEPT Technologies
AEG-Beteiligunsgesellschaft MBH
AEG-Westinghouse Transportation Systems, Inc.
Airship Industries, Ltd.
Computer Aided Training Company, Inc.
Electromar Industria Electrica Brasileira, S.A.
Electromar Nordeste, S.A.
Email Westinghouse Pty., Ltd.
Enwesa Servicios, S.A.
Eregli Demir ve Celik Fabrikalori, A.S.
Escorts, Ltd.
Gamma Metrics
Industria IEM, S.A. de C.V.
Infrared Fiber Systems, Inc.
Innovative Technologies Inc.
Inova Microelectronics, Inc.
Integrated Communication Systems Inc.
Integrated Power Corporation
Mecanica Pasada, S.A.
Mex Control S.A. de C.V.
Micros Systems Inc.
Mictron, Inc.
Mirwec Film, Inc.
Mitsubishi Nuclear Fuel Co., Ltd.
Powerex, Inc.
Project Funding Corporation
Serratosa & Castells, S.A.
Siam Toracato de Tella, Ltd.
Silectra S.A. de C.V.
Speech Plus
Texas PFC, Inc.
Theta J Corporation

Turbine Metal Technologies, Inc.
Tyree Industries Limited
Westralian Transformers Pty. Limited
United Western Technologies Corp.
Vektron S.A.
W. S. Industries (India) Ltd.
Westinghouse Airship Industries, Inc.
Westinghouse de Argentina, S.A.
New Trends Corporation
Porta Pack Corporation
Country American Corporation
Horizon International Television, Inc.
Sutro Towers, Inc.
Metron, Inc.
Harbinger*EDI Services, Inc.
Industrias Electronica, S.A. (INDELEC)
Westinghouse Electro Metalurgicas C.A. (WEMCA)
Westinghouse do Brasil S.A. (WEBSA)
Electromar Industria Electrica Brasileira, S.A.
Westinghouse Electric Australia Holdings Ltd.
Email Westinghouse Private, Ltd.
Email Westinghouse Properties
Contadores Electricos, C.A. (CONTELCA)
Elektrik Techizati Imalti Tesisati, A.S.
Horiba Westinghouse, Ltd.
Hyosung Heavy Industries, Ltd.
Industria Electrica de Mexico, S.A.
Industria et Technologie de la Machine Intelligentie (ITMI)
ISCOSA Industries and Maintenance, Ltd.
Maihak A.G.
Reftrans, S.A.
Societe Generale de Travaux Electriques (SGTE)
ETIC BV Rotterdam
Westinghouse de Argentina, S.A.
Westinghouse Asia Controls Corporation (WEASIA)
Cemac Westinghouse Pty. Ltd.
Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)

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WEXICO Systems and Services, Ltd.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-694

ELECTRIC POWER BOARD OF CHATTANOOGA,

Petitioner,

—v.—

MONSANTO COMPANY, GENERAL ELECTRIC COMPANY, McGRAW-EDISON COMPANY, CENTRAL MOLONEY INC, WAGNER ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC CORPORATION, SANGAMO ELECTRIC CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Electric Power Board of Chattanooga ("EPB") has asked this Court to issue a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on July 14, 1989. Because the decision of the Sixth Circuit is correct and does not raise any questions that are worthy of review by this Court, respondents Monsanto Company, General Electric Company, McGraw-Edison Company, Central Moloney Inc, Wagner Electric Corporation, and Westinghouse Electric Corporation (collectively the "respondents") urge the Court to deny the Petition for a Writ of *Certiorari*.

STATEMENT OF THE CASE

This case concerns properly functioning electrical equipment, the overwhelming majority of which was purchased over ten years before the complaint was filed, and some of which was purchased as long as fifty years ago. Petitioner's claims were based on the mere presence in that equipment of polychlorinated biphenyls ("PCBs") and on the restrictions allegedly placed on the equipment by regulations issued by the Environmental Protection Agency ("EPA"). Because its claims were subject to dismissal under the pertinent Tennessee statutes of repose and limitations,[2] petitioner sought to circumvent these statutes by trying unsuccessfully to force the facts of the case into various legal theories which it argued would have saved its claims. First, petitioner alleged that the statutes were tolled by respondents' alleged fraudulent concealment of the alleged dangers of PCBs. When it appeared that this argument would be rejected because, as both the district court and the Sixth Circuit found, petitioner knew of the alleged hazards of PCBs "at the latest by 1980" (Pet. App. at 17a),[3] petitioner shifted its theory of the case to one based on property damage, alleging a cause of action based on the "weeping" or leaking of PCBs, which occurs during the normal operation of electrical equipment. Both the district court and the Sixth Circuit rejected these arguments and petitioner's claims were dismissed accordingly.

The dismissal of petitioner's claims by the district court and the Sixth Circuit's affirmance of that dismissal were based on

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2 The Tennessee Statute of Repose for products liability claims, T.C.A. § 29-28-102(6), bars all claims relating to products purchased over ten years before the filing of the complaint. Tennessee's statute of limitations for breach of warranty claims, T.C.A. § 47-2-725(2), is four years. Tennessee's statute of limitations for tort claims, T.C.A. § 28-3-105, is three years. All of petitioner's equipment was sold to it by August 1981, and most of it was sold to it by August 1975. Petitioner's complaint was filed on August 23, 1985.

3 References to the Sixth Circuit decision contained in the Petitioner's appendix are referred to herein as "Pet. App. at _____." References to the Petition are referred to herein as "Pet. at _____."

factual determinations concerning what petitioner knew about its injuries, and when petitioner knew it. Specifically, both the district court and the Sixth Circuit, relying on a massive and undisputed factual record,[4] held that petitioner's claims were time-barred under the applicable state statutes of limitations because the alleged dangers of PCBs, including the propensity of PCB equipment to leak, were actually known to petitioner and were a matter of public record for many years before it filed its complaint.[5] In reaching its decision, the Sixth Circuit concluded that there was no basis for applying the accrual date of a federal statute, the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), which EPB argued would have saved its claims, because the accrual date under SARA was identical to that of the state statute of limitations. (Pet. App. at 19a). This conclusion did not implicate or in any way involve any constitutional or other far-ranging provisions of law. Nor was it inconsistent with any decisions of other federal courts. Indeed, petitioner expressly acknowledges that the Sixth Circuit's decision is "the sole decision by a federal court of appeals on this point." (Pet. at 11; *see also* Pet. at 14, 15).

EPB nevertheless submitted a petition for *certiorari*, asserting that this Court should consider this case because the Sixth Circuit was supposedly "in error" (Pet. at 15) in deciding not to substitute the accrual date of the pertinent SARA provision, under which, according to EPB, its claims would have accrued later than under the Tennessee statute of limitations. (Pet. at 15). EPB's position is without merit.

First, this Court does not sit as a "court of error" and should not be reviewing a case simply because the petitioner believes it was wrongly decided. This is especially so where, as the petitioner admits, the decision below is "the sole appellate interpre-

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4 The record in this case included 360 filings and was approximately 5,000 pages long.

5 The district court held that petitioner's claims were barred by the Tennessee Statute of Repose. The Sixth Circuit held that petitioner's claims were barred under Tennessee's tort and warranty statutes of limitations and, therefore, did not need to address whether the claims were also barred by the Tennessee Statute of Repose.

tation" of the provision that purportedly was wrongly construed. (Pet. at 15). *Second*, the issue raised by EPB was *not* wrongly decided and is merely a red herring. The legislative history of SARA clearly reflects that the SARA provision at issue, 42 U.S.C. § 9658(b)(4), was intended to superimpose a discovery-based accrual date on those few states which do not already have one, and by its terms, the section may be invoked only if its accrual date is later than the accrual date under the state statute of limitations. *See infra* point IB. As the Sixth Circuit recognized, however, the Tennessee tort statute of limitations applicable to petitioner's claims is subject to a discovery rule identical to that of § 9658, and its application yields the same result as would application of § 9658. Thus, under either statute, EPB's claims would be barred because it knew or should have known of its alleged injuries many years before it filed its claims.

Indeed, the actual source of EPB's disagreement with the decision is not the Sixth Circuit's construction of the federal statute but the factual determinations which underlay the Sixth Circuit's application of the Tennessee statute of limitations, *i.e.*, determinations regarding the dates and nature of EPB's injuries, and its knowledge of such injuries. Such fact-based determinations do not represent important questions of law which this Court should consider.

Statement of Facts

The equipment at issue in this case consists of thousands of transformers which allegedly contained PCBs. The undisputed record reflects that all of this equipment was purchased more than four years before the commencement of this litigation and that the vast majority was purchased well over ten years before the filing of the action.[6] The record also reflects that, as a result of Congressional hearings, government reports and EPA

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6 *See* R. 306: Def. Mem. in Support of Joint Motion to Enforce, Exh. 2. *See also*, R. 120: EPB Response No. 1 to GE Requests for Admission at 1-2; R. 83: EPB Supp. Answers to GE Interrogatories; R. 78: EPB Supp. Answers to McGraw-Edison Interrogatories; R. 81: EPB Supp. Answers to Wagner Electric Interrogatories.

notices and regulations, the alleged dangers resulting from the presence of PCBs in such equipment have been a matter of public knowledge since the 1970's. (Pet. App. at 9a). Part of that public record included an EPA notice issued in March 1980, which was based on reports submitted by utility industry representatives that PCBs tend to "weep" or "sweat" from electrical equipment during their normal operation, and which specifically requested information on the incidence and hazards of such leaks. (Pet. App. at 9a). The "weeping" and "sweating" addressed in that notice and in those reports are precisely the type of "property damage" which petitioner alleged in this case.

Petitioner admitted before the courts below that it reviewed and monitored the public record and proceedings concerning PCBs on a regular basis and has been aware since at least 1976 that PCBs may be hazardous.[7] Petitioner also admitted to the court below that PCB transformers leak "during normal operation" and that they knew this fact years ago.[8]

The District Court's Rulings

In a series of decisions which addressed the public record on PCBs and the key statute of limitations issues raised by that record, the district court dismissed petitioner's claims as time-barred. In those decisions, the court rejected petitioner's arguments that the pertinent statutes of repose and limitations were tolled by respondents' alleged fraudulent concealment of the hazards of PCBs, concluding that petitioner had actual knowledge of the hazards of PCBs at least since 1976.[9]

In an effort to avoid the first of the court's rulings that its claims were time-barred, petitioner amended its complaint and shifted its theory of the case from one based on the alleged restrictions on its equipment set forth in the EPA regulations to

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7 *See* R. 298: Order, April 30, 1987 at 3; R. 260: Affidavit of Ronald N. Fugatt ("Fugatt Aff.") ¶¶ 6-10; R. 260: Affidavit of Harold DePriest ("DePriest Aff.") ¶ 3.

8 *See* R. 260: DePriest Aff. ¶ 10.

9 *See, e.g.*, R. 298: Order, April 30, 1987 at 3.

one based on "property damage". This new focus was based on the SARA amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which were enacted only weeks before petitioner shifted its theory of the case. SARA provides for the preemption of state statutes of limitations for property damage and personal injury claims arising from a "release into the environment" of a "hazardous substance". With respect to such claims, the statute provides for a discovery-based accrual date (the "federally required commencement date") which preempts state statutes of limitations in those circumstances when a claim accrues earlier under the state statutes of limitations than it does under the federally required commencement date. *See* 42 U.S.C. § 9658.

Petitioner moved to modify and reverse the district court's order based on these SARA amendments, alleging, for the first time, that in 1982 they had observed "property damage" caused by leaks from 106 PCB transformers onto the floors of vaults in which the equipment was contained.[10]

The district court rejected petitioner's property damage claims, stating that the alleged "leaks" were not "releases into the environment" within the meaning of CERCLA and noting that petitioner was "attempting to force the facts of [the] case into CERCLA reasoning . . . ."[11]

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10 R. 260: Fugatt Aff. ¶ 6. Petitioner's initial attempt to construct a property damage claim within SARA was premised upon the pouring of PCBs into the equipment at issue by the respondents at their own facilities. R. 250: Response of EPB to Sangamo's Motion for Summary Judgment at 11; *see also* R. 216: Memorandum in Support of Motion of Plaintiffs to Modify Order on Statute of Repose Issues at 7; R. 220: Plaintiffs' Response to Defendants' Memorandum in Opposition to Motion of Plaintiffs to Modify Order at 5-6. The district court rejected these claims and petitioner subsequently abandoned them.

11 R. 274: Order, February 19, 1987 at 3; *see also* R. 298: Order, April 30, 1987 at 2.

The Sixth Circuit Decision

The Sixth Circuit affirmed the district court's decision, rejecting both petitioner's fraudulent concealment and CERCLA arguments. The Sixth Circuit held that "[petitioner] had *actual* knowledge of the hazards of PCBs as used in electrical equipment" more than three years before they filed this suit (Pet. App. at 14a) (emphasis in original) and stated that petitioner's arguments to the contrary were "specious". (Pet. App. at 15a). In addressing the evidence of petitioner's prior knowledge of the alleged hazards of PCBs, the court reiterated the extensive public record on the dangers of PCBs, and singled out, as part of that record, the EPA's March 1980 notice, which requested information from utilities about the incidence and hazards of electrical equipment leaks. (Pet. App. at 15a). After observing that petitioner monitored EPA regulations relating to PCBs, and therefore presumably was aware of this notice, the court stated that petitioner "had every reason to become wary of the use of PCBs in electrical equipment by March 1980 at the latest." (Pet. App. at 14a-15a).

The Sixth Circuit then stated that the application of CERCLA and, in particular, the "federally required commencement date", to petitioner's claims would not change the result in the case because the federal accrual date "is virtually identical to the notion of an accrual date under Tennessee law". (Pet. App. at 19a). The court noted that under both CERCLA and the Tennessee statutes of limitations, petitioner's claims accrued when it knew or should have known of its cause of action (*i.e.*, when petitioner knew or should have known of the alleged "leaks" or "releases into the environment"). (Pet. App. at 19a). Accordingly, presented with petitioner's own statements that PCB equipment leaks during normal operation, the public record concerning the propensity of PCB equipment to leak during normal operation and the undisputed evidence of petitioner's knowledge of this public record, the court ruled that petitioner's property damage claims would be time-barred under either CERCLA or the Tennessee statute of limitations, thereby rendering application of CERCLA unnecessary.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO ISSUES WARRANTING SUPREME COURT REVIEW

The EPB contends that the Sixth Circuit erred in its interpretation of 42 U.S.C. § 9658 and ignored certain facts which allegedly established that EPB's injuries occurred within the period of limitations. The petition should be denied because it meets none of the requirements governing review on *certiorari* set forth in Rule 17. It does not involve a conflict either among the circuits or with any state court. Indeed, EPB admits that the Sixth Circuit's decision "is the only decision of which we are aware" that even addresses the issue EPB attempts to raise in this petition. (Pet. at 14). Nor does the petition present an important question of federal law with a potentially broad effect.

In fact, the entire petition is nothing more than an extended argument as to why the Sixth Circuit's decision was supposedly wrong on the merits. That argument requires this Court to review the validity of certain factual determinations made by the courts below—clearly an inappropriate task for this Court to undertake. In this case, moreover, such factual review would violate the longstanding rule that "this Court . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). Thus, a grant of *certiorari* would not only be unwarranted, but improper.

In addition, petitioner's claim that the Sixth Circuit's construction of § 9658 was erroneous is simply incorrect.

First, the Sixth Circuit did not rule that EPB's property damage claims accrued before the date of its injuries, and EPB's arguments to the contrary turn on a mischaracterization of the Sixth Circuit's analysis of the factual record.

Second, the accrual date for EPB's claims under the Tennessee statute of limitations is identical to the "federally required commencement date", and, therefore, the outcome of the case would have been the same regardless of which accrual date had been applied.

Third, the courts which have considered the issue of what constitutes a "release into the environment from a facility" within the meaning of § 9658 have unanimously concluded that § 9658 has no application to the factual circumstances presented by this case for reasons not addressed by the Court of Appeals.

A. The Sixth Circuit Did Not Hold That EPB's Claims Accrued Before The Date Of Its Alleged Injuries

EPB's entire petition is premised on the contention that, in applying the Tennessee statute of limitations to bar its claims for alleged property damage, the Sixth Circuit held that EPB's claims accrued before the date of its alleged injuries (*i.e.*, before the alleged release of a hazardous substance). An examination of the Sixth Circuit's decision in light of the factual record, however, demonstrates clearly that this is not what the Sixth Circuit ruled.

The extensive and undisputed record before both the district court and the Sixth Circuit reflects, *inter alia*, that EPB monitored and reviewed the public record and proceedings concerning the alleged hazards of PCBs on a regular basis and was aware of such hazards, including the propensity of PCB equipment to leak, for many years prior to the filing of their complaint. The incidence and hazards of leaks from PCB equipment have been the subject of EPA notices and regulations since at least March 1980. (Pet. App. at 14a). Moreover, EPB has admitted in its own submissions that leaks from PCB equipment, including its own such equipment, much of which has been in use for over thirty years, occur "during normal operation"[12] and are, therefore, common occurrences.

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12 R. 260: DePriest Aff. ¶ 10.

As the Sixth Circuit recognized, tort claims under Tennessee law accrue "when a plaintiff knows or reasonably should know that he has a cause of action against a defendant." *Mackey* v. *Judy's Foods, Inc.*, 654 F. Supp. 1465, 1471 (M.D. Tenn. 1987), *aff'd*, 867 F.2d 325 (6th Cir. 1989). Thus, when presented with the above record, the Sixth Circuit concluded that all of petitioner's claims, including its claims for property damage, were time-barred under Tennessee's statute of limitations because it knew or should have known of the availability of such claims long ago.[13] The Sixth Circuit did not hold that a claim could accrue under the Tennessee statute of limitations *before* the date of the injuries (*i.e.*, before the release of the hazardous substance).[14] To the contrary, the Sixth Circuit's explicit references to the EPA's public notice to the utilities concerning leaks from PCB equipment (Pet. App. at 9a) reflect that its decision was based on the reasoned conclusion that the types of leaks in question occurred years before the filing of the complaint and should have been known to EPB at least as early as March 1980.

Moreover, the Sixth Circuit's conclusions as to when EPB's claims accrued are heavily fact-based determinations which were rooted in a careful analysis of the record. Such determinations include findings concerning the dates of EPB's alleged injuries and its knowledge of those alleged injuries. Clearly, such findings should not be the subject of this Court's review.

That EPB's current quarrel is not with the Sixth Circuit's legal conclusions but with its factual determinations is further

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13 The court's conclusion was consistent not only with the case law of Tennessee but also with numerous jurisdictions which subscribe to the same concept of accrual as does Tennessee. In those jurisdictions, a plaintiff with the means of knowing the extent or cause of his injuries has a duty to inquire about such injuries, and breach of that duty results in the running of the statute of limitations. *See, e.g., Herrera-Diaz* v. *United States Dept. of Navy*, 845 F.2d 1534, 1537 (9th Cir.), *cert. denied*, _____ U.S. _____, 109 S. Ct. 306 (1988); *Huff* v. *Fibreboard Corp.*, 836 F.2d 473, 479 (10th Cir. 1987).

14 As the Sixth Circuit recognized, under Tennessee law a tort claim *cannot* accrue until the injury occurs. *See, e.g., Potts* v. *Celotex Corp.*, 703 F. Supp. 672, 673 (E.D. Tenn. 1988).

evidenced by its suggestion that its property damage claims based on alleged leaks "arose" within three years of the date of the complaint. (*See* Pet. at 10-11; *see also* Pet. at 9, 15). This position was not originally argued before the Sixth Circuit and was submitted to that court for the first time only in EPB's petition for rehearing. EPB's prior assertions in affidavits and briefs concerning the alleged leaks merely stated that upon inspection of certain PCB transformers in 1982, some of those transformers were "found to have leaks."[15] EPB never asserted in those papers that the leaks did not *occur* until after November 1982 and thus that no claim could have arisen until after that date.

B. The Commencement Date Under State Law Is Identical To The "Federally Required Commencement Date"

EPB contends that the Sixth Circuit should have applied the "federally required commencement date" contained in § 9658 to its claims for property damage, rather than the accrual date of the Tennessee statute of limitations. That contention, however, presumes that there is a distinction between the accrual date under the Tennessee statute of limitations and the federally required commencement date. (Pet. at 13-14). In fact, such a distinction does not exist, and there is no basis for the distinction in either Tennessee law, the language of the Sixth Circuit's decision, or the legislative history of § 9658.

Under Tennessee law, statutes of limitations for all tort claims, including claims for property damage, are subject to a judicially created "discovery rule". *McCroskey* v. *Bryant Air Conditioning Co.*, 524 S.W.2d 487, 491 (Tenn. 1975). As noted above, under this rule, such claims accrue "when a plaintiff knows or reasonably should know that he has a cause of action against a defendant." *Mackey* v. *Judy's Foods, Inc.*, 654 F.

15 R. 260: Fugatt Aff. ¶ 6; *see also* R. 259: Plaintiffs' Response to Westinghouse Electric Corporation's Motion for Summary Judgment at 5-7; R. 291: Affidavit of Ronald N. Fugatt ¶¶ 3-5; R. 293: Memorandum in Support of EPB's Motion to Modify March 20, 1987 Order at 2-6; and R. 322: Plaintiffs' Response to Defendants' Joint Motion to Enforce April 30, 1987 Order at 9.

Supp. 1465, 1471 (M.D. Tenn. 1987), *aff'd*, 867 F.2d 325 (6th Cir. 1989). Moreover, contrary to EPB's assertion, state law requires more than mere knowledge (or in this case, mere notice) of the injury before the statute begins to run. The would-be plaintiff must have knowledge of the existence of his cause of action against the tort-feasor, that is, knowledge of both the injury and its cause:

> [T]he discovery rule in Tennessee requires the discovery of the existence of a right of action, *i.e.*, facts which would support an action for tort against the tortfeasor—these facts include not only the existence of an injury, *but the tortious origin of the injury*.

Potts v. *Celotex Corp.*, 703 F. Supp. 672, 673 (E.D. Tenn. 1988) (emphasis supplied).

As the Sixth Circuit correctly concluded, the federally required commencement date reflects the identical concept of accrual. Thus, the language of § 9658 contains the critical "knows or reasonably should have known" language common to all discovery rules.[16] Indeed, the legislative history of § 9658 reflects that the very purpose of the provision was to establish the type of discovery statute of limitations for certain property damage claims which was already in place in Tennessee.[17] As demonstrated in a special report prepared for Congress by a group organized to study the ramifications of the then proposed § 9658, the intent of the statute was to superimpose a discovery

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16 Section 9658(b)(4)(A) states that the federally required commencement date "means the date the plaintiff *knew (or reasonably should have known)* that the . . . [property damages in question] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." (emphasis added).

17 *See* Superfund Section 301(e) Study Group, *Injuries and Damages from Hazardous Waste—Analysis and Improvement of Legal Remedies, A Report to Congress in Compliance with Section 301(e) of The Comprehensive Environmental Response, Compensation, and Liability Act of 1980* (P.L. 96-510), S. Rep. No. 97-12, 97th Cong., 2d Sess. ("Section 301(e) Report"), pt. 1 at 240. EPB recognized that § 9658 merely established "a discovery statute of limitations for toxic tort action brought in state court" in its brief before the Sixth Circuit. Plaintiffs' Appellate Brief at 37.

rule upon the "small number of states [which] still follow the so-called traditional rule that the cause of action accrues from the time of exposure" and "[a]nother small number of states [which] has not as yet clearly adopted either the traditional or discovery rule". Section 301(e) Report, pt. 1 at 240.

The Sixth Circuit was therefore correct in ruling that accrual of a property damage claim occurs at the same time under the Tennessee statute of limitations as it does under the federally required commencement date. Since there was no conflict between the federal and state rules, the federal provision is inapplicable by its own terms. Section 9658 states that the federally required commencement date for certain property damage claims shall be applied in lieu of the date specified by the state's statute of limitations only if the accrual date under the state's statute of limitations period is earlier than the federally required commencement date. § 9658(a)(1). In this case, the commencement dates under § 9658 and the Tennessee statute of limitations are the same, and the Sixth Circuit was required to apply the state statute of limitations.

C. The Courts Which Have Addressed The Issue Of What Constitutes A "Release Into The Environment From A Facility" Within The Meaning Of § 9658 Have Unanimously Concluded That § 9658 Does Not Apply To The Factual Circumstances Presented By This Case

The Sixth Circuit saw no need to address the separate question of whether the kind of leaks involved in this case constitutes property damage within the meaning of § 9658. However, if this Court were to conclude that the accrual date under § 9658 differs from that of the Tennessee statute of limitations, § 9658 still would not control the outcome of this case. All courts that have interpreted § 9658 in the context of the types of leaks alleged in this case have concluded that it has no application. The reasons articulated by these courts preclude application of § 9658 to the facts of this case.

First, § 9658 does not apply because a statutory prerequisite to the application of the statute, *i.e.*, a "release into the envi-

ronment from a facility", did not occur. *See* 42 U.S.C. § 9658(a)(1); 42 U.S.C. §§ 9601(8), (9), (22); R. 298: Order, April 30, 1987 at 2. As the district court found, the record does not support any claim that a hazardous substance, leaking from one facility (a transformer) into another (a vault housing the transformer), constituted a release "into the environment" as defined in the statute.[18] This is because the vaults into which the leaks occurred do not fit within any of the statutory categories defining "environment": navigable waters, surface water, groundwater, drinking water, land surface or subsurface strata, or ambient air. 42 U.S.C. § 9601(8). Other courts have reached the same conclusion.[19]

Second, § 9658 is inapplicable because this case could not give rise to an underlying CERCLA claim. Congress intended § 9658 to preempt state statutes of limitations only in "personal injury or property damage causes of action under state law in situations where there is an underlying CERCLA action providing for cleanup and remedial activities." *Knox* v. *AC&S, Inc.*, 690 F. Supp. 752, 757 (S.D. Ind. 1988). *See also Electric Power Bd. of Chattanooga* v. *Westinghouse Elec. Corp.*, 716 F. Supp.

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18 R. 349: Order, January 26, 1988 at 2.

19 *See Electric Power Bd. of Chattanooga* v. *Westinghouse Elec. Corp.*, 716 F. Supp. 1069, 1081 (E.D. Tenn. 1988) (Edgar, J.). In that case, the court concluded that "the leaking of a relatively small quantity of dielectric fluid" containing PCBs from a transformer into a vault is not "the type of release into the environment contemplated or intended by the CERCLA." *Id.*

Even more recently, the Seventh Circuit acknowledged that interpreting the term "environment" in such a way that a "release into the environment" occurs, for example, "the instant a container of asbestos is opened" would render the term meaningless. *Covalt* v. *Carey Canada Inc.*, 860 F.2d 1434, 1436 (7th Cir. 1988). Judge Easterbrook observed that:

> [s]uch a global treatment erases "released into the environment" as a limitation, however, by ensuring that it is always satisfied.
>
> . . .
>
> [I]t is hard to believe that "released into the environment" is an empty phrase.

860 F.2d at 1436-37.

at 1081. EPB has conceded that this case does not present an underlying CERCLA claim.[20]

Thus, § 9658 would not provide the rule of decision in this case in any event.

Conclusion

For the foregoing reasons the petition for a writ of *certiorari* should be denied.

Respectfully submitted this 22nd day of November, 1989.

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20 *See* R. 342: Pl. Reply to Def. Response at 4, 9.

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In The

Supreme Court of the United States

October Term, 1989

ELECTRIC POWER BOARD OF CHATTANOOGA

Petitioner,

v.

MONSANTO COMPANY
GENERAL ELECTRIC COMPANY
MCGRAW-EDISON COMPANY
CENTRAL MOLONEY, INC.
WAGNER ELECTRIC CORPORATION
WESTINGHOUSE ELECTRIC CORPORATION
SANGAMO ELECTRIC CORPORATION

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR THE PETITIONER ELECTRIC POWER BOARD OF CHATTANOOGA

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United States Supreme Court Rule 28.1 1

Petitioner, Electric Power Board of Chattanooga, presents this Brief pursuant to Rule 22.5 in response to certain arguments raised in the Respondents' Brief in Opposition and in further support of its Petition for Writ of Certiorari.[1]

ARGUMENT

The Electric Power Board of Chattanooga (hereinafter "Chattanooga" or "EPB"), asks that the Court consider the following points in response to arguments raised in the Respondents' Brief in Opposition:[2]

1. *The federally required commencement date under 42 U.S.C. § 9658 and the commencement date under Tennessee law are not identical.* Contrary to the argument pressed by the Respondents there is a clear distinction between the accrual date of a cause of action under Tennessee law and the "federally required commencement date" contained in 42 U.S.C. § 9658. Under Tennessee law, statutes of limitations for tort claims are governed by a form of discovery rule, and commence when a plaintiff discovers his injury or should have discovered it through the exercise of reasonable care and diligence. *See, e.g., McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487, 491 (Tenn. 1975). On its face, this rule is clearly distinct from the

[1] Pursuant to Rule 28.1, the Electric Power Board of Chattanooga states that the designation of corporate relationships included in its Petition for Writ of Certiorari is currently accurate.

[2] References to the Respondents' Brief in Opposition are referred to herein as "Brief in Opp. at ___."

operative language of 42 U.S.C. § 9658 which, at § 9658(b)(4)(A) defines the "federally required commencement date" to be "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

While it is possible that, under certain sets of facts, the federally required commencement date under 42 U.S.C. § 9658 and the commencement date under Tennessee law coincidentally will be identical, that is not true in all cases. It is not true in this case. While both the Tennessee and the federal rule speak to what the "plaintiff knew or reasonably should have known", the federal statute is keyed to the plaintiff's knowledge of a particular fact: that the plaintiff's injury was caused or contributed to by the release of the "hazardous substance or pollutant or contaminant concerned". Because it is thus tied to a plaintiff's specific knowledge that his injury has stemmed from a release of a hazardous substance, the "federally required commencement date" cannot occur prior to the date of that release. In contrast, under the Tennessee rule, "discovery" would take place upon knowledge of the fact of an injury even if there was no knowledge of the connection between the injury and a release of a hazardous substance. Forcing the body of the federal statute into the more restrictive mold of the Tennessee discovery rule would defeat the clear Congressional intent that the carefully described federal commencement date in 42 U.S.C. § 9658 be applied to claims within its scope, not merely that some form of discovery rule obtain.

2. *Chattanooga does not seek review of any findings of fact.* Chattanooga does not seek to have this Court review any factual determination made by the Court of Appeals, let alone a concurrent finding by the Court of Appeals and the District Court. *Cf.* Brief in Opp. at 8. EPB presented evidence that numerous transformers manufactured by each of the Equipment Defendants leaked PCBs into transformer vaults of EPB, contaminating and damaging EPB property other than the transformers themselves, within three (3) years of the date of the commencement of this action. This evidence is undisputed on the record. The evidence consists of inspection reports documenting inspections that began in November of 1982, so that subsequent inspections necessarily show the leaks that occur after that date. R.291: Affidavit of Ronald Fugatt (April 10, 1987). There has been no determination by either the Court of Appeals or the District Court that such leaks, as described, did not occur. Chattanooga seeks review by this Court of the Court of Appeals' determination as to the operation of 42 U.S.C. § 9658 under this admitted set of facts.

3. *Chattanooga has not sought construction of Tennessee state law.* Chattanooga has not claimed that the Sixth Circuit held that Chattanooga's property damage claims accrued before the dates of its injuries. *Cf.* Brief in Opp. at 8. Chattanooga's complaint is directed to the holding of the Sixth Circuit that the "federally required commencement date" under 42 U.S.C. § 9658 can occur at some date prior to the date of the release of the hazardous substance which caused the damage for which recovery is sought. It

is this holding which does violence to the intent of Congress in enacting 42 U.S.C. § 9658.[3]

4. *The releases of hazardous substances at issue are within the scope of 42 U.S.C. § 9658.* The Court of Appeals pretermitted the question of whether 42 U.S.C. § 9658 applied to the releases of hazardous substances at issue in this case, a matter which should be addressed by the Court of Appeals in the first instance. However, contrary to the implication of the argument presented by the Respondents, the facial application of 42 U.S.C. § 9658 to the Petitioner's claim is clear. Cases cited by the Respondents address markedly different factual circumstances and do not provide any support for their claim that the releases of hazardous substances in this case that caused damage to the Petitioner are not releases into the environment from a facility within the meaning of 42 U.S.C. § 9658. Both *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434 (7th Cir. 1988) and *Knox v. AC&S, Inc.*, 690 F.Supp. 752 (S.D. Ind. 1988) involved injuries resulting from exposure to asbestos and are more appropriately analyzed on the basis that certain asbestos actions are exceptions from the scope of CERCLA, rather than on the basis of a restricted construction of 42 U.S.C. § 9658. *See First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d

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[3] Given that 42 U.S.C. § 9658 would preempt the application of state law as to any claims within its scope, Chattanooga has not and will not argue whether or not the Court of Appeals correctly determined the proper accrual date under Tennessee law. However, as a general rule, it appears clear that a series of distinct injuries arising from a single defective product gives rise to a series of causes of action as of the date of each distinct injury.

862, 869 n.12 (4th Cir. 1989). As analyzed by the District Court, involved the release, the case of *Electric Power Board of Chattanooga v. Westinghouse Electric Co.*, 716 F.Supp. 1069 (E.D. Tenn. 1988), as a result of a fire and explosion and resulting rupture of a transformer, of PCBs "within the confines of a penthouse containing electrical equipment." 716 F.Supp. at 1081. Neither situation is comparable to that presented in the present case, where the releases have occurred in outdoor vaults, open to the weather. The Respondents' argument amounts to a claim that there can be no "release" into the "environment" if the environment in question also falls within the definition of "facility". Given the very broad construction of "facility" under CERCLA, such a reading would make § 9658 virtually meaningless. *See, e.g., State of New York v. General Electric Co.*, 592 F.Supp. 291, 295-296 (N.D. N.Y. 1984) ["Facility" includes any place where a hazardous substance has come to be located.]

The Respondents have also asserted that 42 U.S.C. § 9658 is inapplicable to the contamination of downtown transformer vaults at issue here because that contamination could not give rise to a claim for response costs under CERCLA. *See* Brief in Opp. at 14. Contrary to the Respondents' assertion, Chattanooga has never "conceded" that this case does not present an underlying CERCLA claim. Rather, Chattanooga has only stated that it has not asserted a claim under CERCLA against these manufacturers. CERCLA Section 107, 42 U.S.C. § 9607, clearly permits recovery of response costs incurred as a result of releases of PCBs that contaminate the environment, including buildings. The cases relied upon by Respondents involved contamination within buildings

caused by asbestos, a type of contamination for which Congress expressly rejected the availability of cost recovery actions under CERCLA. *See First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 867-869 (4th Cir. 1989). Respondents appear to argue that 42 U.S.C. § 9658 cannot apply to state law causes of action for personal injuries or property damage if the same causes of action could not be brought against the same defendants under CERCLA § 107, 42 U.S.C. § 9607. This construction of 42 U.S.C. § 9658 would make its reference to state actions for personal injury meaningless, as Section 107 of CERCLA permits no recovery for personal injuries.

Here there clearly would be available a CERCLA cause of action for recovery of response costs incurred as a result of releases of PCBs into open transformer vaults. Even those opinions suggesting that an "underlying" CERCLA claim is necessary for the application of 42 U.S.C. § 9658 do not suggest that the plaintiffs and defendants in the state causes of action to which 42 U.S.C. § 9658 would apply and the hypothetical CERCLA cause of action need be the same, nor is there any basis under the reasoning of the cases cited by the Respondents for such a requirement. The courts in those asbestos cases were merely concerned that the application of 42 U.S.C. § 9658 not stray too far beyond the scope of the subject matter of CERCLA.

CONCLUSION

Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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